87-1521

No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

DANIEL J. MAHONEY, JR.
EXECUTOR OF THE ESTATE OF JAMES M. COX, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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March 14, 1988

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QUESTIONS PRESENTED

1. Whether the Sixth Circuit's decision precluding application of the estate tax exception in Section 2036(a) of the Internal Revenue Code to an integrated transaction that enhanced rather than depleted Decedent's gross estate must be reversed because it conflicts with decisions of this Court and the other circuits requiring application of the statutory exception to such transactions.

2. Whether the Sixth Circuit so departed from the accepted and usual course of judicial proceedings as to call for supervision by this Court when, in reversing the district court judgment, it decided an issue presented to but not adjudicated by the district court (*viz.*, whether the Section 2036(a) exception applies where Decedent received property in an integrated transaction worth at least as much as the property transferred).*

* The names of the parties to the proceedings below are all contained in the caption of the case.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner Daniel J. Mahoney, Jr., executor of the Estate of James M. Cox, Jr. (the "Estate"), respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The Sixth Circuit's opinion is reported at 831 F.2d 641 and is reprinted in the Appendix at pages 1a-16a. The decision of the United States District Court for the Southern District of Ohio is reported at 628 F. Supp. 273 and is reprinted in the Appendix at pages 17a-36a.

On December 30, 1987, petitioner filed a motion to modify seeking a clarification of the Sixth Circuit's opinion, and subsequently the Attorney General of the State of Ohio filed a brief amicus curiae in support of that motion.

The Sixth Circuit denied the request for clarification, without accompanying explanation, on March 8, 1988; this Order is reprinted in the Appendix at page 37a.[1]

JURISDICTION

The Estate brought this action in the United States District Court for the Southern District of Ohio for a refund of estate tax and deficiency interest paid. The district court ruled in favor of the Estate and ordered a refund. On appeal, the Sixth Circuit reversed the district court in a decision entered on October 16, 1987. The Sixth Circuit subsequently stayed its mandate.

On January 4, 1988, Justice Antonin Scalia granted an extension of time for filing this petition to and including March 14, 1988. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

26 U.S.C. § 2036 (1974)[2]

> (a) GENERAL RULE.—The value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to

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[1] Specifically, the motion requested that the Sixth Circuit clarify its opinion by adding the following sentence to the end of footnote 12: "We express no opinion on whether the transfer falls within the scope of the bona fide sale exception to Section 2036." The Sixth Circuit's denial of the motion is in substance a ruling that the exception does not apply. *See infra* pp. 14-15.

[2] All references to sections of the Internal Revenue Code are to the Code as in effect at Decedent's death in 1974, unless otherwise noted.

his death or for any period which does not in fact end before his death—

(1) the possession or enjoyment of, or the right to the income from, the property, or

(2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom.

STATEMENT OF THE CASE

This case involves a trust established by the former Governor of Ohio, James M. Cox, Sr., in February 1941 (the "Trust"). Governor Cox funded the Trust with 750 shares of stock in The Atlanta Journal Company ("Atlanta Journal") that he had purchased in December 1939 for $6.2225 per share.[3] Governor Cox named his personal legal advisor as Trustee and designated his son, James M. Cox, Jr. ("Decedent"), as income beneficiary for life, with remainder to Decedent's then-wife and Decedent's issue, and in default of any such issue, to other trusts established by Governor Cox for his descendants.

In connection with the Governor's creation of the Trust, Decedent executed a promissory note payable to his father in the amount of $4,666.88, equal to Governor Cox's basis in the stock. Both the note and the Trust instrument explicitly stated that Decedent's note was in payment for the 750 shares of stock transferred to the Trust and that the note was to be satisfied from dividends from the stock placed in the Trust by Governor Cox. Subsequently, the Internal Revenue Service (the "Service") and Governor Cox agreed that the 750 shares of Atlanta Journal stock had a value in February 1941 of $41,250. Thus, Decedent's $4,666.88 note represented 11.3136 percent of the value of the stock transferred to the Trust.

[3] The Trust was one of five substantially similar trusts established by Governor Cox in 1941 for his wife, children and a close personal friend.

The Estate did not report the value of any of the stock in the Trust on its federal estate tax return upon Decedent's death in 1974. The Estate took the position that only Governor Cox had made a transfer to the Trust because he had created and funded it and arranged the transaction so that he would be paid for the stock from the dividends on the 750 shares he transferred, and not from any assets of Decedent. Decedent had only a life estate in the stock that terminated upon his death. Therefore, there was nothing to include in the Estate under Section 2036(a) of the Internal Revenue Code of 1954 (the "Code").[4]

The Service audited Decedent's estate tax return and assessed a deficiency. The Service took the position that Decedent, in essence, had purchased an undivided interest in 11.3136 percent of the 750 shares of stock from Governor Cox and had simultaneously transferred that interest into the Trust retaining a life interest in the income from that portion of the stock. The Service concluded that Decedent therefore had "made a transfer" within the meaning of Section 2036(a) and was required to pay estate tax on the date-of-death value of the 11.3136 percent interest "transferred" to the Trust. The Estate paid the deficiency assessed and filed suit for a refund, invoking jurisdiction in the district court pursuant to 28 U.S.C. § 1346(a)(1).

[4] Section 2036(a) is designed to prevent avoidance of federal estate tax through the inter vivos transfer of legal title to property with the retention of the benefit of the property for life. In such cases, Section 2036(a) requires that the transferred property be included in the transferor's estate for purposes of computing the federal estate tax. There is a statutory exception, however, that recognizes that where the transferor receives in a transaction other property having a value at least equal to the property transferred, the estate is not diminished and there is no tax avoidance; in those circumstances, the transferred property is not brought back into the transferor's gross estate.

In determining whether a portion of the Trust was includable in Decedent's gross estate under Section 2036(a), the district court focused on two issues: (1) whether Decedent had furnished consideration to Governor Cox; and (2) if so, whether he had received an undivided interest in 11.3136 percent of the 750 shares of Atlanta Journal stock and then "transferred" it to the Trust or whether he had merely purchased a life estate in the stock. 628 F. Supp. at 274; Appendix at 18a. On the first issue, the court found that Decedent had paid the $4,666.88 consideration to Governor Cox, notwithstanding that Decedent's note was in fact satisfied from the dividends on the stock transferred in trust by Governor Cox. 628 F. Supp. at 280; Appendix at 30a. On the second issue, the court found that Decedent had purchased only a life estate that had terminated upon his death. Therefore, the court held, Decedent had not "transferred" property to the Trust within the meaning of Section 2036(a). 628 F. Supp. at 281; Appendix at 32a. Although the Estate argued that Decedent's gross estate was not diminished in the transaction taken as a whole, the court had no reason to, and did not, address the exception to Section 2036(a). The court concluded that no part of the Trust was includable in Decedent's gross estate and ordered a refund of taxes paid. 628 F. Supp. at 282; Appendix at 35a. The Service appealed.

On appeal, the Sixth Circuit upheld the district court's finding that Decedent had provided consideration to Governor Cox, 831 F.2d at 644-46; Appendix at 5a-7a, and reversed the lower court's decision that Decedent had not "made a transfer" to the Trust, 831 F.2d at 646-50; Appendix at 7a-16a. The Sixth Circuit held that the Trust documents established that Decedent had paid for the funding of the Trust, and had not simply purchased a life interest, and concluded that "decedent must be considered the effective grantor of the Trust to the extent of his contribution." 831 F.2d at 648-49 (footnote and citations omitted); Appendix at 12a-14a. The Sixth Circuit also stated that Decedent in substance had pur-

chased 11.3136 percent of the 750 shares of stock, or approximately 85 shares, from his father and had transferred the 85 shares to the Trust, retaining a life interest in the income from those shares. 831 F.2d at 649-50; Appendix at 15a.

The Sixth Circuit concluded its analysis at this point, but, instead of remanding the case for the district court to determine the applicability of the statutory exception, it went on to hold that the value of the 85 shares of stock "must be included in decedent's gross estate under Section 2036(a)." 831 F.2d at 649 (footnote omitted); Appendix at 14a-15a. This holding, coupled with the Sixth Circuit's perfunctory denial of petitioner's motion seeking clarification of the opinion, is in substance a determination that the Section 2036(a) exception does not apply in this case, and that determination should be reviewed by this Court.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Conflicts With the Decisions of This Court and Other Circuits and Raises an Important Question of Federal Estate Tax Administration That Should Be Resolved by This Court.

In analyzing an integrated transaction, the entire transaction must be considered objectively to determine its ultimate economic impact. *United States v. Estate of Grace*, 395 U.S. 316, 325 (1969); *see Helvering v. Le Gierse*, 312 U.S. 531, 540 (1941).[5] Until the Sixth Circuit's decision in this case, this principle had been applied uniformly by the circuit courts in cases under Section 2036(a). *See, e.g., Estate of Christ v. Commissioner*, 480 F.2d 171

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[5] An "integrated" transaction involves multiple, interrelated steps. *See Estate of Grace*, 395 U.S. at 325; *Le Gierse*, 312 U.S. at 540. The transaction involved here is an example: Governor Cox established the Trust and funded it with 750 shares of stock; Decedent transferred to the Governor a note in the principal amount of $4,666.88; and Decedent received a life interest in the income from the Trust created and funded by Governor Cox. *See Lazarus v. Commissioner*, 513 F.2d 824, 829 (9th Cir. 1975).

(9th Cir. 1973); *In re Estate of Davis*, 440 F.2d 896 (3d Cir. 1971); *United States v. Gordon*, 406 F.2d 332 (5th Cir. 1969); *United States v. Past*, 347 F.2d 7 (9th Cir. 1965); *Estate of Vardell v. Commissioner*, 307 F.2d 688 (5th Cir. 1962); *Sullivan's Estate v. Commissioner*, 175 F.2d 657 (9th Cir. 1949); *Helvering v. United States Trust Co.*, 111 F.2d 576 (2d Cir.), *cert denied*, 311 U.S. 678 (1940).

Section 2036(a) requires inclusion in the gross estate of the value of property transferred by a decedent during his life in which the decedent retains a life estate, unless the property is transferred in "a bona fide sale for an adequate and full consideration in money or money's worth." *Estate of Christ*, 480 F.2d at 172; *accord In re Estate of Davis*, 440 F.2d at 897; *Past*, 347 F.2d at 12; *Sullivan's Estate*, 175 F.2d at 659. Section 2036(a) is one of several estate tax provisions of the Code designed to tax inter vivos transfers that are, in essence, substitutes for testamentary dispositions. *See generally* C. Lowndes, *Federal Estate and Gift Taxes* 295-97 (2d ed. 1962).[6] These statutory provisions, however, "are not intended to penalize bona fide sales and exchanges which do not deplete the transferor's estate." *Id.* at 295. Each provision dealing with such transfers contains an explicit exception for transfers from a decedent's gross estate that are exchanged for an adequate and full consideration. *See id.* at 295-97.

The rationale for the statutory exception is that, when property transferred is replaced with property of equal or greater value, the estate has not been depleted, and the property transferred should not be taxed. "If, in connection with a transfer, the decedent receives full consideration in money or money's worth, then the trans-

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[6] The other provisions of the Code that tax inter vivos transfers include Section 2035 (transfers in contemplation of death); Section 2037 (transfers taking effect at death); and Section 2038 (revocable transfers).

fer amounts only to a substitution or exchange of assets, the gross estate is not reduced, and no estate tax is avoided." R. Stephens, *Federal Estate and Gift Taxation* ¶ 4.07[2][c], at 4-121 (5th ed. 1983); *see also Commissioner v. Bristol*, 121 F.2d 129, 133-34 (1st Cir. 1941) (consideration is received if transferor gives something away and replaces it with something of equal value in money's worth); R. Stephens, *supra*, ¶ 4.08[1], at 4-130.

In cases involving integrated transactions in which the transferor receives a life interest in income from a trust, *Estate of Grace* requires that the transaction be viewed in its entirety to determine whether "an adequate and full consideration" is received.[7] 395 U.S. at 325; *see also Le Gierse*, 312 U.S. at 540. As the Ninth Circuit succinctly stated in *Past*: "The value of what the decedent received under the trust must be measured against the value of the property she transferred to the trust." 347 F.2d at 12 (citing *Estate of Gregory v. Commissioner*, 39 T.C. 1012 (1963)). Simply, the value of the estate before the transaction is compared with its value after the transaction. *Cf. Lazarus v. Commissioner*, 513 F.2d 824, 829 (9th Cir. 1975) (all instruments involved in transaction must be considered together).

For example, in *In re Estate of Davis*, 440 F.2d 896, the Third Circuit found that the decedent's funding of a trust was an integral part of a larger transaction in-

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[7] In *Estate of Grace*, this Court considered the net effect of reciprocal trust agreements executed by a husband and wife. There, each party, as part of a larger transaction, transferred property to a trust and directed that a life interest go to the other spouse. The Court held that each party, in effect, had created a trust and retained a life interest because that was the net economic effect of the entire transaction. As a result, the estate of each spouse was depleted, and the transferred property was taxed under the predecessor to Section 2036(a). *See* 395 U.S. at 325. The same analysis applies in this case but with a different result. Here, Decedent's estate almost certainly was not depleted as the net result of the transaction.

tended to satisfy his obligation to support his wife.[8] *Id.* at 898. The Third Circuit held that the discharge of the decedent's support obligation was the consideration received by him in exchange for funding the trust. Because the annuity value of this consideration was at least as much as the value of the property transferred by the decedent to the trust, the exception applied and the trust corpus was not included in the decedent's estate. *Id.* at 900.

Further, in *Sullivan's Estate*, 175 F.2d 657, the Ninth Circuit held that the exception applied to a contract severing a joint tenancy and transferring the decedent's one-half interest to his wife in exchange for her one-half interest. The transaction appeared to be testamentary in nature, accomplished less than two weeks before the ailing decedent's death at age 77, and was found to have been executed in contemplation of death. *Id.* at 658. Nonetheless, the court looked at the substance of the transaction and its overall effect on the decedent's estate and held that the statutory exception applied. *Id.* at 659-60.[9]

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[8] It was undisputed that, because the decedent had retained significant control over the trust, the corpus must be included in his estate under Section 2036(a) unless the bona fide sale exception applied. *In re Estate of Davis*, 440 F.2d at 897.

[9] Numerous other lower courts have applied the principles established by this Court and the courts of appeals in determining the applicability of the Section 2036(a) exception. For example, in its recent decision in *Gradow v. United States*, 11 Cl. Ct. 808, 810-16 (1987), the Claims Court recognized that the ultimate effect of a transaction controls its estate tax treatment. The court concluded that the decedent's "transfer" of her half interest in the community property was an integral part of the creation and funding of the trust involved, and that a life estate which the decedent received in the exchange was consideration for her transfer. *Id.* at 810. Similarly, in *Estate of Kitchin v. Commissioner*, 53 T.C.M. (CCH) 1275, 1278-79 (1987), the Tax Court applied the Section 2036(a) exception to a transaction involving several instruments. The court, considering the transaction in its entirety, concluded that the

In this case, the Sixth Circuit ignored this principle. In holding that Decedent "purchased" 85 shares of stock from Governor Cox and "transferred" them to the Trust, the Sixth Circuit, of necessity, considered the Governor's establishment of the Trust, Decedent's issuance of his promissory note, and Decedent's receipt of a life interest as an integrated transaction. But to then conclude that the 85 shares are includable in Decedent's gross estate, the Sixth Circuit must have regarded Decedent's "transfer" of those shares and Governor Cox's transfer of the remaining 665 shares (and Decedent's receipt of a life interest in those shares) as separate and independent transactions. Having considered the net effect of the entire transaction for the purpose of finding a "transfer" by Decedent to the Trust, it was error for the Sixth Circuit then to separate the transaction into its constituent parts, as though each took place in isolation, for the purpose of applying the statutory exception.

As a result, the court failed to focus consistently on the economic impact of the transaction as a whole. This improper analysis resulted in the Sixth Circuit's overbroad holding that the value of the stock was "includable." Focusing on the entire transaction, it is clear that the "transfer" by Decedent almost certainly enhanced rather than diminished his gross estate since Decedent transferred $4,666.88 in value and received a life interest in 750 shares.[10] Unfortunately, the Sixth Circuit, without

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decedent ultimately received as much as he had transferred. *Id.* at 1276-79; *accord Council v. United States*, 302 F. Supp. 1315, 1324-26 (N.D. Miss. 1969); *Nourse v. Riddell*, 143 F. Supp. 759, 762 (S.D. Cal. 1956); *Estate of McCoy v. Commissioner*, 20 T.C.M. (CCH) 224, 228 (1961); *see also Puchner v. United States*, 274 F. Supp. 704, 708 (E.D. Wis. 1967); *Whiteley v. United States*, 214 F. Supp. 489, 494-95 (W.D. Wash. 1963); *Estate of Friedman v. Commissioner*, 40 T.C. 714 (1963).

[10] Although Decedent received a life interest in the entire Trust corpus (750 shares), the life interest in the 85 shares deemed to have been transferred by Decedent does not constitute part of the consideration received by Decedent. *Gordon*, 406 F.2d at 343-44;

the benefit of any factual determinations or legal analysis by the district court on the issue, effectively decided that Decedent did not receive in the exchange property of at least equal value.

The Sixth Circuit's ruling undermines the legislative purpose of the statutory exception. Since the statute was first enacted in 1916, Congress has purposefully excluded exchanges that do not deplete an estate and, therefore, do not result in any avoidance of estate taxation.[11] *See generally* C. Lowndes, *supra*, at 295, 312; R. Stephens, *supra*, ¶ 4.07 [2] [c], at 4-121.

The Sixth Circuit's decision also undercuts the fair, efficient and uniform administration of federal estate taxation. *See Estate of Grace*, 395 U.S. at 318. The de-

Estate of Vardell, 307 F.2d at 690. Nonetheless, the life interest in the remaining 665 shares, regardless of how received, was consideration. As explained in *Bristol*, under both the gift tax and estate tax provisions of the Code:

> "Consideration" . . . is not the same as common law consideration; it means that when the transferor gives something away and does not at the same time replace it with money of equal value or some goods or services capable of being evaluated in money, he is deemed to have made a gift within the taxing law.

121 F.2d at 133. Therefore, it makes no difference that the district court found that Governor Cox funded the Trust in part through a gift. *See* 628 F. Supp. 278; Appendix at 27a. The determinative factor under the statutory exception is not the characterization of the transaction in which the transferor receives property (*e.g.*, by gift or otherwise), but rather whether the property received is of equal or greater value than the property transferred.

[11] *See* Section 202(b) of the Revenue Act of 1916, Pub. L. No. 271, 39 Stat. 756, 777-78 (1916). At that time, the statute excluded transfers for "a fair consideration in money or money's worth." This was changed to the present wording in the Revenue Act of 1926. *See* Section 302(c) of the Revenue Act of 1926, Pub. L. No. 20, 44 Stat. 970 (1926) (applied in *United States Trust Co.*, 111 F.2d at 577); *see also* Section 811(c) of the Revenue Act of 1939, 53 Stat. 1 (applied in *United States v. Allen*, 293 F.2d 916, 918 (10th Cir.), *cert. denied*, 368 U.S. 944 (1961)).

cision greatly diminishes the predictability of estate tax liability whenever a decedent has transferred property as part of an integrated transaction. Moreover, tax liability in such situations may vary, depending upon the federal circuit in which the decedent was a resident.[12] It is patently unfair to treat similar transactions differently according to the federal jurisdiction involved.

Further, the effect of the Sixth Circuit's decision would be the double taxation of a transferor's property: the property transferred would be taxed under the Sixth Circuit's interpretation of Section 2036(a), and the property of equal value received in exchange would be taxed under the general inclusion rule of Section 2033 of the 1986 Code.[13] Indeed, it is conceivable that, if the Sixth Circuit's decision is allowed to stand, the tax imposed on a decedent's estate could well exceed the value of the assets in the estate. This unreasonable result would impact all taxpayers in situations involving integrated transactions in the Sixth Circuit.

II. The Sixth Circuit's Reversal of the District Court Deciding an Issue Not Passed Upon Below so Far Departs From the Accepted and Usual Course of Judicial Proceedings as to Call for Supervision by This Court.

The Sixth Circuit reversed the district court deciding the applicability of the statutory exception, an issue not

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[12] The confusion created by the Sixth Circuit's decision will persist under the Tax Reform Act of 1986. Section 2036(a) and the statutory exception for exchanges for "an adequate and full consideration in money or money's worth" remain intact under the new law. *See* 26 U.S.C. § 2036(a). Therefore, it is extremely important that the conflict and confusion created by the Sixth Circuit be resolved by this Court.

[13] Section 2033 of the Internal Revenue Code of 1986 provides: "The value of the gross estate shall include the value of all property to the extent of the interest therein of the decedent at the time of his death."

passed upon below. This substantially departs from the accepted and usual course of judicial proceedings and the principles established by this Court regarding the proper disposition of federal litigation. *See Guste v. Jackson*, 429 U.S. 399, 399-400 (1977) (per curiam) (vacating overbroad injunction and remanding on issues not addressed below); *Singleton v. Wulff*, 428 U.S. 106, 120-21 (1976) (federal appellate court should not consider issue not passed upon below); *Helvering v. Tex-Penn Oil Co.*, 300 U.S. 481, 498 (1937) (absence of lower court ruling deprives appellate court of assistance of decision below); *United States v. Shelby Iron Co. of New Jersey*, 273 U.S. 571, 581-82 (1927) (proper to remand on issue neither considered by nor fully presented to lower court); *see also Massachusetts Mutual Life Insurance Co. v. Ludwig*, 426 U.S. 479, 480-81 (1976) (per curiam) (remanded on issue not reached or decided by lower court; inappropriate to reach merits in appellate court); *Hormel v. Helvering*, 312 U.S. 552, 556-59 (1941) (appellate court ordinarily does not consider issues not addressed below).

The district court ruled on only two issues in this case: (1) whether Decedent had paid consideration to Governor Cox; and (2) if so, whether Decedent received an undivided interest in 11.3136 percent of the 750 shares of Atlanta Journal stock and then transferred it to the Trust or whether he had purchased a life estate in the stock. The court held that Decedent had paid consideration but that he had purchased only a life estate that terminated at his death; therefore, he could not have made a "transfer" to the Trust. 628 F. Supp. at 274; Appendix at 18a-19a. The district court, having ruled in favor of the Estate on the transfer issue, did not address any other substantive issues. The court concluded:

> In the absence of the transfer of an interest in property, § 2036(a) does not require the inclusion of the value of that property in a gross estate.

628 F. Supp. at 282 (Conclusion of Law 4); Appendix at 35a. In the absence of a transfer, the statute simply does not apply, and the applicability of the exception is not at issue.

It was entirely proper for the district court to end its legal analysis after concluding that there had been no transfer under the statute. *See, e.g., Jimenez v. Weinberger*, 417 U.S. 628, 637-38 (1974) (three-judge district court upheld statute without addressing claimant's assertion that exception would apply; reversed on other grounds and remanded for consideration of exception issue); *cf. Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967) (Third Circuit reversed district court without reaching merits; Supreme Court reversed on other grounds and remanded to consider merits), *overruled on other grounds, Califano v. Sanders*, 430 U.S. 99, 105 (1977). Given its ruling on the transfer issue, it was unnecessary for the district court to reach, much less resolve, the statutory exception issue. *See Hughes v. Dempsey-Tegeler & Co.*, 534 F.2d 156, 174 (9th Cir.), *cert. denied*, 429 U.S. 896 (1976). Thus, although the issue plainly was recognized by the court,[14] the court had no reason to, and did not, pass upon whether the transfer was for an adequate and full consideration under Section 2036(a).

On appeal, the Sixth Circuit upheld the finding that Decedent had paid consideration to Governor Cox, 831 F.2d at 644-46; Appendix at 5a-7a, but reversed the district court on the transfer issue, 831 F.2d at 646-50; Appendix at 7a-16a. The Sixth Circuit's ruling that Decedent had made a transfer to the trust of, in effect,

[14] The district court referred directly to the exception, indicating clearly its view that it was relevant only if Decedent had made a "transfer": "[T]here must be an inter vivos transfer by decedent . . . , in trust or otherwise, other than a bon[a] fide sale for full and adequate consideration in money or money's worth . . . ." 628 F. Supp. at 278; Appendix at 26a.

85 shares of stock necessitates consideration of whether that transfer was in exchange for an adequate and full consideration in money or money's worth.

Instead of remanding the exception issue for consideration by the district court, the Sixth Circuit, without any discussion of the issue, held that the value of the 85 shares transferred to the Trust was "includable" in the Estate under Section 2036(a). In so holding, and in denying the Estate's motion seeking clarification of the opinion, the Sixth Circuit effectively ruled on the applicability of the statutory exception, an issue not resolved or relied upon below. *See Estate of Guenzel v. Commissioner*, 258 F.2d 248, 252 (8th Cir. 1958) (Tax Court, in finding that trust was includable in gross estate, "necessarily determined that [decedent] did not make a bona fide sale of his trust assets").

The Sixth Circuit plainly erred in reversing without remanding on the exception issue. As this Court has stated, "[i]t is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below." *Singleton*, 428 U.S. at 120; *Hormel*, 312 U.S. at 556-57; *see Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 141 (1969) (refusing to decide issue not passed upon by appellate court); *cf. Commissioner v. McCoy*, 108 S. Ct. 217, 219 (1987) (per curiam) (appellate court lacked jurisdiction to decide questions that were not and could not have been presented below); *Youakim v. Miller*, 425 U.S. 231, 235-37 (1976) (per curiam) (Court remanded to district court rather than decide question not raised or resolved below). It is also well established by this Court that an appellate court cannot base a *reversal* on a theory not relied upon by the district court.[15] *Tex-Penn Oil Co.*, 300 U.S. at 497-98;

[15] This rule contrasts with the general rule allowing an appellate court to *affirm* a judgment below on a ground not considered or decided by a district court. *See Helvering v. Gowran*, 302 U.S. 238,

see also Stern v. United States Gypsum, Inc., 547 F.2d 1329, 1333-34 (7th Cir.), *cert. denied*, 434 U.S. 975 (1977); *Hormel*, 312 U.S. at 556; *see also Morrow v. Greyhound Lines, Inc.*, 541 F.2d 713 (8th Cir. 1976).

The proper procedure to follow in the event an issue arises that was not passed upon below is to remand that issue to the district court for its consideration in the first instance. *See Guste*, 429 U.S. at 399-400; *Massachusetts Mutual Life Insurance Co.*, 426 U.S. at 480-81; *Peoria Tribe of Indians of Oklahoma v. United States*, 390 U.S. 468, 473 (1968); *Securities and Exchange Commission v. Chenery Corp.*, 318 U.S. 80, 88, 95 (1943); *Helvering v. Gowran*, 302 U.S. 238, 245-47 (1937); *Shelby Iron Co. of New Jersey*, 273 U.S. at 581-82; *cf. Singleton*, 428 U.S. at 121 (remand from Supreme Court to court of appeals).[16]

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245 (1937). The reason for the latter rule is that it would be wasteful to remand a case simply to reinstate a decision on grounds which the appellate court believes are correct and has the authority to decide. *Securities and Exchange Commission v. Chenery Corp.*, 318 U.S. 80, 88 (1943). This principle does not apply, and a remand is appropriate, when issues of fact must be determined or when the other grounds were not fully presented to the higher court. *Aetna Casualty & Surety Co. v. Flowers*, 330 U.S. 464, 468 (1947); *see Chenery Corp.*, 318 U.S. at 88.

There are limited exceptions to the rule against an appellate court reversing on issues not passed upon below. Where the proper resolution of the issue as a matter of law is beyond any doubt, where injustice might otherwise result, or where jurisdictional questions are presented, a circuit court may address such issues. *Singleton*, 428 U.S. at 121 (citing *Turner v. City of Memphis*, 369 U.S. 350 (1962) (per curiam) and quoting *Hormel*, 312 U.S. at 557); *see also Blair v. Oesterlein Machine Co.*, 275 U.S. 220, 225 (1927); *Stern v. United States Gypsum, Inc.*, 547 F.2d 1329, 1333-34 (7th Cir.), *cert. denied*, 434 U.S. 975 (1977). None of these exceptions applies here. They apply only in unusual cases, and never where issues of fact must be resolved by the district court. *See Chenery Corp.*, 318 U.S. at 88.

[16] This procedure has been followed in numerous cases by the circuit courts. *See e.g., Laney v. Commissioner*, 674 F.2d 342, 351

The principal reasons for this procedural scheme are those of fairness and efficiency. Allowing the district court to consider the issues in the first instance permits both parties to participate in the factual inquiry by introducing the evidence, if any, they believe relevant, *Hormel*, 312 U.S. at 556, and by presenting legal arguments on each issue to be resolved by the district court. *Singleton*, 428 U.S. at 120; *see Tex-Penn Oil Co.*, 300 U.S. at 498; *Helvering v. Wood*, 309 U.S. 344, 349 (1940). This process also gives the appellate court the benefit of a ruling below, *Chenery Corp.*, 318 U.S. at 88-89; *Wood*, 309 U.S. at 349, and, depending on the outcome in the district court, may obviate the need for an appellate court to address the issues, *see Sanders v. International Ass'n of Bridge, Structural and Ornamental Iron Workers, AFL-CIO*, 546 F.2d 879, 882-83 (10th Cir. 1976).

This case demonstrates the reasons for the rule. The Sixth Circuit's ruling that Decedent in substance made a transfer of 85 shares of stock to the Trust necessitates a finding by the district court as to the consideration received by Decedent as part of the overall transaction. The parties are entitled to be heard on the applicability of the statutory exception. The failure of the Sixth

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(5th Cir. 1982) (remanded for Tax Court to consider whether parties may offer additional evidence, whether there was valid assignment, and whether recapture of portion of sale price was required); *Wilson v. St. Louis-San Francisco Railway Co.*, 673 F.2d 1152, 1155 (10th Cir. 1982) (remanded for consideration of relevance of evidence on issue not previously considered by trial court); *Walker Manufacturing Co. v. Dickerson, Inc.*, 560 F.2d 1184, 1186-87 (4th Cir. 1977) (remanded for determination of applicability of statute of limitations not previously raised in or considered by lower court); *Commissioner v. Estate of Nelson*, 396 F.2d 519, 524 (2d Cir. 1968) (remanded for Tax Court to determine whether value of marital support rights was "adequate and full consideration in money or money's worth" for total assets transferred to trust); *see also Pharo v. Smith*, 625 F.2d 1226, 1227 (5th Cir. 1980) (per curiam) (remanded for district court to consider whether to dismiss pendant state claims when federal claims already resolved).

Circuit to remand the case is a significant departure from the settled course of appellate procedure, requiring supervision by this Court. The Sixth Circuit should be reversed and the case remanded for the district court to consider the Section 2036(a) exception.

CONCLUSION

For the reasons stated above, this Court should grant the Estate's Petition for a Writ of Certiorari to review the issues presented herein.

Respectfully submitted,

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March 14, 1988

APPENDIX

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

No. 86-3086

DANIEL J. MAHONEY, JR., EXECUTOR OF THE ESTATE OF JAMES M. COX JR.,
Plaintiff-Appellee,

v.

UNITED STATES OF AMERICA,
Defendant-Appellant.

Argued Jan. 27, 1987
Decided Oct. 16, 1987

Michael L. Paup, D. Patrick Mullarkey, Tax Div., Dept. of Justice, Roger M. Olsen, Washington, D.C., Dale Goldberg, Asst. U.S. Atty., Cincinnati, Ohio, Robert S. Pomerance (argued), Washington, D.C., Steven W. Parks, for defendant-appellant.

Robert P. Bartlett, Jr., Dayton, Ohio, Albert H. Turkus (argued), Dow, Lohnes & Albertson, Washington, D.C., Bernard J. Long, Jr., for plaintiff-appellee.

Before KENNEDY and NORRIS, Circuit Judges, and CELEBREZZE, Senior Circuit Judge.

CELEBREZZE, Senior Circuit Judge.

Defendant United States of America appeals the district court judgment granting a refund of estate taxes to plaintiff Daniel J. Mahoney, Jr., executor of the estate of James M. Cox, Jr. ("estate"). The district court ordered

the refund based on its determination that James M. Cox Jr., the decedent, had not "made a transfer" under I.R.C. § 2036(a) (1982) when he paid consideration to his father in conjunction with the father's transfer of stock into a trust naming the decedent as life beneficiary. *Mahoney v. United States*, 628 F.Supp. 273 (S.D. Ohio 1985). The government argues on appeal, and we agree, that the district court erred in interpreting the term "transfer" in section 2036(a). Accordingly, we reverse.

I.

In December, 1939, James M. Cox Sr. ("Governor Cox"[1]), decedent's father, purchased all of the outstanding stock in the Atlanta Journal Company ("Atlanta Journal"). As a result of the purchase and a subsequent recapitalization, Governor Cox received all 4,000 shares of Atlanta Journal common stock, which had a cost basis of $6.2225 per share. Governor Cox used the Atlanta Journal common stock in 1941 to fund five trusts.

The "James M. Cox Jr, Trust" ("Trust")[2] named the decedent as the income beneficiary for life and named as remaindermen decedent's wife and his lineal decendants. The Trustee was Governor Cox's attorney. Governor Cox funded the Trust with 750 shares of the Atlanta Journal common stock. In exchange, the decedent executed an interest-bearing promissory note payable to his father in an amount equal to Governor Cox's basis in the 750 shares, $4,666.88. Decedent's promissory note stated that it was executed "in payment for 750 shares of common stock of the Atlanta Journal Company." The Trust instrument likewise acknowledged that on the day the Trust was

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[1] James M. Cox Sr. was a former Governor of the State of Ohio and Democratic Party nominee for President of the United States in 1920. *See* Appellee's Brief at 3.

[2] The other four trusts were for the benefit of Governor Cox's wife, his two daughters (decedent's half-sisters), and his former son-in-law.

established, decedent "executed and delivered [a note] in payment for the stock which is the subject matter of this trust."

The Trust further provided that the Trustee was to pay the principal and interest on the note with the income from the 750 shares. The stock generated dividends of $4,500 in 1941, and of $7,500 annually from 1942 to 1944. During those four years, the dividends were applied to discharge the note (principal and interest) in full. However, the annual payments on the loan were not made by the Trustee as the Trust instrument directed, but were withheld by the Atlanta Journal and paid directly to Governor Cox. Regardless of the actual payment procedure, however, the decedent treated the dividends used to pay off the note as constructively received by him for income tax purposes: he reported those dividends as his income and claimed deductions for the amounts used to satisfy interest on the note.

Several years after the Trust was created, the Internal Revenue Service (IRS) reviewed the transaction and requested that Governor Cox file a gift tax return. Governor Cox complied, but reported no taxable gift, maintaining that the $4,666.88 paid by decedent for the 750 shares represented the fair market value of Atlanta Journal stock in 1941. After an audit, the IRS challenged Governor Cox's valuation of the stock. The parties settled the dispute in 1952, however, agreeing that the fair market value of Atlanta Journal common stock in 1941 was $55 per share, or $41,250 for 750 shares. Governor Cox thereafter reported a taxable gift of $36,583, the agreed value of the stock in 1941 less the consideration received in discharge of decedent's note.

The decedent died in 1974. On his estate's federal tax return, none of the property from the "James M. Cox Jr. Trust" was included in decedent's gross estate. The estate took the position that decedent had not "made a transfer" of property to the Trust, but that any transfer had been

made by Governor Cox. The estate therefore contended that the "Transfers with retained life estate" provision of I.R.C. § 2036(a) (1982) was inapplicable.

The IRS audited the return and assessed an estate tax deficiency. The IRS found irrelevant the fact that Governor Cox, not the decedent, made the actual transfer of stock into the Trust. The IRS reasoned that the transaction left the decedent in the same economic position as if he had purchased $4,666.88 worth of stock (the equivalent of 85 shares at $55 per share) outright from his father, transferred those shares to the Trust for the benefit of his heirs, and reserved for himself an equitable life estate in the stock. Under this theory, the government concluded that in substance the decedent had "made a transfer" under section 2036(a) and, therefore, that 11.3136 percent[3] of the date-of-death value of the trust property, or $5.5 million, was includable in decedent's gross estate. The estate paid the asserted deficiency, filed an administrative claim for refund, which was denied, and then brought this action in district court.

After conducting a bench trial, the district court granted the estate a refund. The court initially found that Governor Cox had funded the Trust through a partial sale and partial gift, *Mahoney*, 628 F.Supp. at 278, and that the decedent, not the Trust, had paid the $4,666.88 in consideration to Governor Cox for the sale portion of the stock transfer, *id.* at 279-80. The court further concluded, however, that the decedent purchased only a life estate in the Trust corpus, essentially because Governor Cox exclusively controlled the creation and funding of the Trust. *Id.* at 280-82. On this basis, the district court held that the decedent did not make a "transfer" into the

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[3] The amount paid for the stock by the decedent in 1941, $6.2225 per share, was 11.3136% of the fair market value in 1941, $55 per share. The remaining 88.6864%, or $48.7775 per share, represents the value of Governor Cox's gift to the trust in 1941, for which Governor Cox paid the gift tax in 1952, and is not relevant to the instant case.

Trust under section 2036(a) and, therefore, that no part of the Trust should be included in decedent's gross estate. *Id.* at 281. The court ordered a refund of $7.9 million paid to the estate. This timely appeal ensued.

II.

Before addressing the district court's interpretation of the term "transfer," the estate asserts an independent ground for affirming the court's decision. The estate contends that the district court erred in holding that the decedent paid the $4,666.88 in consideration to Governor Cox. In support of this argument, the estate asserts several alternative views of the evidence: that Governor Cox retained an income interest in the stock dividends to the extent of his basis in the transferred stock; that the Trust, not the decedent, discharged the note; that the decedent was a surety for the Trust's debt; or that the debt created by the note was not a "real" debt in view of the family relationship and the decedent's healthy financial status in 1941. Because the decedent did not pay the consideration, the argument concludes, he could not have "made a transfer" under section 2036(a).

The district court's conclusion that the decedent paid the consideration to Governor Cox, however, is a finding of fact that a reviewing court may not reverse unless "clearly erroneous." Fed.R.Civ.P. 52(a).[4] A finding of

[4] The estate also argues that the decedent paid no consideration to Governor Cox, as a matter of law, because Governor Cox retained an interest income in the stock under the Trust terms, citing *Greene v. United States*, 237 F.2d 848 (7th Cir. 1956), and *Estate of Fry v. Commissioner*, 9 T.C. 503 (1947), *acq.*, 1948-2 C.B. 2, and because decedent's note did not represent a valid indebtedness of the decedent, citing *Deal v. Commissioner*, 29 T.C. 730 (1958). None of these cases, however, addresses the question of whether an individual has paid consideration to the grantor of a trust when he executes an interest-bearing note payable to the grantor, the note is in fact discharged in full, and the individual treats the amounts used to discharge the note as his constructive income.

fact will only be clearly erroneous "when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948)). In addition, the clearly erroneous standard is applicable "even when the district court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts." *Id.* 470 U.S. at 574, 105 S.Ct. at 1512; *see* Fed.R.Civ.P. 52(a), advisory committee notes, 1985 amendment. Under this deferential standard, the appellate court must vigilantly refrain from conducting a *de novo* review of the evidence. *Bessemer City*, 470 U.S. at 573-74, 105 S.Ct. at 1511-12. Viewing this record in its entirety, *id.* at 574, 105 S.Ct. at 1512, we conclude that the district court did not clearly err.

The Trust instrument itself declared that the 750 shares of Atlanta Journal stock were transferred into the Trust in exchange for consideration paid by the Trustee *and* the decedent. The Trustee, however, never made a payment to Governor Cox. Rather, the decedent executed a note, payable to Governor Cox, that was "in payment for" the 750 shares. The execution of the note "in payment" for the stock and the corresponding provision in the Trust document require the conclusion that, in form, the transaction was arranged so that the decedent would pay the consideration. Although the note was discharged by the corporation withholding a portion of the dividend payments each year over a four year period, the decedent treated the funds used to discharge the note as his constructive income and claimed deductions for the interest paid. The decedent's income tax treatment of the payments confirmed that the transaction was completed in

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We therefore conclude that the cited cases do not control the resolution of the unique factual situation that this case presents.

substance consistent with what it purported to be in form: a payment from the decedent to his father. The estate's alternative constructions of the evidence, although perhaps plausible, do not mandate a finding of clear error.[5] "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Bessemer City*, 470 U.S. at 574, 105 S.Ct. at 1512. Accordingly, we hold that the district court did not clearly err in holding that the decedent paid consideration to Governor Cox at the time the stock was transferred to the Trust.

III.

We now turn to the district court's application of section 2036(a). In determining whether the decedent's payment of consideration to Governor Cox in conjunction with

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[5] In support of its argument that the district court clearly erred, the estate points out: that by 1941, the earnings prospects of the Atlanta Journal were so good that the dividends from the common stock would certainly be sufficient to discharge the note; that Governor Cox's control over the Atlanta Journal ensured that such dividend payments would be forthcoming; and that in 1941, the decedent was financially well off and could have paid the $4,666.88 in cash, if the parties intended him to pay the consideration. From these facts, and considering the parties' family relationship, the estate concludes that the parties did not intend that the decedent pay the consideration, and that decedent's note did not represent a valid debt. Finally, the estate asserts that the withholding of the dividends by the Atlanta Journal precludes the finding that the decedent discharged the note.

The estate's contention that this intrafamily debt was not "real" and, therefore, that the decedent did not discharge the debt is not compelling on the facts of this case. The decedent executed an interest-bearing promissory note in payment for the stock. While this formality itself is not conclusive as to the validity of the debt, the fact that the note was discharged in full, including the interest due, renders immaterial whether the discharged debt was ever legally binding. It was paid off; the question becomes who made the payments on the debt. In our view, the decedent's tax treatment of the payments as his constructive income is more than sufficient to support the district court's conclusion that the decedent in substance discharged the note.

the creation of the Trust was a transfer under the statute, the court posed the following question:

> Did James M. Cox, Jr., purchase an undivided or full ownership interest in [11.3136] percent of the 750 transferred shares, or did he purchase only an equitable life estate in the transferred stock?

Mahoney, 628 F.Supp. at 279. In answering this question, the court found important that Governor Cox owned the stock before the transfer, and that he transferred the stock directly to the Trustee without issuing stock certificates to the decedent. *Id.* at 280-81. The dispositive factors in the district court's analysis, however, were that Governor Cox alone created the Trust, funded it, and named the remaindermen, consulting only with his attorney, and that the decedent had no control over, or input into, the terms of the Trust. *Id.* The conclusion concerning the defendant's lack of control, however, did not arise from the transaction itself or the parties' characterization of it, but from the testimony adduced at trial of business associates and relatives to the effect that Governor Cox was "the boss" in virtually all affairs under his domain. Thus, viewing what it termed "the reality of the creation and funding of the . . . Trust," *id.* at 280, the court concluded that "[a]ll James M. Cox received in exchange for the consideration he furnished was the right to receive income for his life." *Id.* at 281. On this basis, the court held that the decedent had not "made a transfer" under section 2036(a). For the following reasons, we reverse.

Under section 2036(a)(1), I.R.C. § 2036(a)(1) (1982),[6] the decedent's gross estate will include the date-of-death

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[6] Section 2036(a) states in pertinent part:

> The value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, under which he has retained for his life or for

value of property if three conditions are met: (1) the decedent must have made an inter vivos transfer of the property; (2) the decedent must have retained the right to the income from the property; and (3) this retention must have been for the decedent's life. *National City Bank of Cleveland v. United States*, 371 F.2d 13, 15 (6th Cir. 1966). In the instant case, there is no dispute that the decedent "retained" the right to the Trust income for his life. *Mahoney*, 628 F.Supp. at 278. The only issue, therefore, is whether the decedent "made a transfer" within the meaning of the statute.

This court has emphasized that the term "transfer" is not to be interpreted in a restrictive manner and should be interpreted to effectuate the purposes of section 2036(a). *See Estate of Shafer v. Commissioner*, 749 F.2d 1216, 1221-22 (6th Cir. 1984). "The general purpose of the statute was to include in a decedent's gross estate transfers that are essentially testamentary—i.e., transfers which leave the transferor a significant interest in or control over the property transferred during his lifetime." *United States v. Estate of Grace*, 395 U.S. 316, 320, 89 S.Ct. 1730, 1733, 23 L.Ed.2d 332 (1969); *see also Estate of Wyly v. Commissioner*, 610 F.2d 1282, 1290-91 (5th Cir. 1980). By taxing essentially testamentary transactions, section 2036(a) prevents "circumvention of federal estate tax by use of schemes which do not significantly alter lifetime beneficial enjoyment of property supposedly transferred by a decedent." *Id.* at 1290; *see also Estate of Shafer*, 749 F.2d at 1222. The applicability of section 2036(a), therefore, is not controlled by the "various niceties of the art of conveyancing," *Commissioner v. Estate of Church*, 335 U.S. 632, 642, 69 S.Ct. 322, 327, 93 L.Ed.

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any period not ascertainable without reference to his death or for any period which does not in fact end before his death—

(1) the possession or enjoyment of, or the right to the income from, the property . . . .

26 U.S.C. § 2036(a)(1) (1982).

288 (1949) (quoting *Klein v. United States*, 283 U.S. 231, 234, 51 S.Ct. 398, 399, 75 L.Ed. 996 (1931)), but is instead dependent upon "the nature and operative effect of the transfer," *Estate of Grace*, 395 U.S. at 323, 89 S.Ct. at 1735 (quoting *Estate of Spiegel v. Commissioner*, 335 U.S. 701, 705, 69 S.Ct. 301, 303, 93 L.Ed. 330 (1949)). As such, the statute operates to tax transfers of property "that are too much akin to testamentary dispositions not to be subjected to the same excise." *Helvering v. Hallock*, 309 U.S. 106, 112, 60 S.Ct. 444, 448, 84 L.Ed. 604 (1940).

Moreover, the purposes of section 2036(a) and the Supreme Court's opinion in *Estate of Grace* counsel against the utilization of evidence that is extrinsic to the transaction and unrelated to the parties' understanding of it in an attempt to reconstruct the creation of a forty year old trust, especially when the only parties to the transfer have long been deceased. *See Estate of Grace*, 395 U.S. at 320, 322-24, 89 S.Ct. at 1734-35. Reliance on such inquiries, based usually on faulty memories and self-serving testimony from family members, can serve only to undermine the consistent and proper application of the statute.[7] *Cf. id.* at 323, 89 S.Ct. at 1734 (inquiries into subjective intent in intra-family transfers create "substantial obstacles to the

[7] In the instant case, for example, none of the witnesses could claim knowledge of the circumstances surrounding the creation of the James M. Cox Jr. Trust. Decedent's two half-sisters, who offered the testimony most probative of what actually occurred in 1941, had no specific memory of the creation of this Trust and had only hazy recollections of conversations with the decedent occurring many years later concerning the Trust. Moreover, under the Trust terms, if the decedent were to die without any lineal decendants, which he did, that portion of the Trust corpus which was to devolve to decedent's lineal descendents would instead devolve to the trusts created in 1941 for the benefit of decedent's half-sisters, *see supra* note 2. As life beneficiaries of those trusts, therefore, the half-sisters have a financial stake in the outcome of this case.

proper application of the federal estate tax laws."). Thus, the includability of a trust corpus under section 2036(a) should, as a general rule, be determined from the trust documents, the timing of the transfers, the value of property transferred, verifiable contemporary characterizations of the transaction, and its objective economic effects. *See, e.g., Estate of Sinclaire v. Commissioner*, 13 T.C. 742, 745-46 (1949) ("true nature of the transfers" not dependent on trust terms alone, but was determined from the timing of two transactions, the nature of the property involved, and other "facts and circumstances attendant" to the transfers, none of which was based on extrinsic evidence); *cf. Estate of Grace*, 395 U.S. at 323-24, 89 S.Ct. at 1734-35 (applicability of reciprocal trust doctrine depends on terms of trust, timing of the transactions, and their objective economic effects, not on inquiries into the parties' subjective intent); *Estate of Whitt v. Commissioner*, 751 F.2d 1548, 1558-59 (11th Cir. 1985) (whether decedent retained a life estate determined from "the surrounding circumstances, particularly the manner in which the parties have dealt with the property"). Only if this evidence is insufficient to disclose the "nature and operative effect" of the transaction, *see, e.g., Estate of Shafer*, 749 F.2d at 1218-20 (extrinsic evidence admitted to resolve ambiguity in deed of sale concerning who purchased the land); *cf. Estate of Grace*, 395 U.S. at 324 n. 10, 89 S.Ct. at 1735 n. 10, or if the parties' characterization of it appears calculated to circumvent the estate tax laws, *see Estate of Wyly*, 610 F.2d at 1290-91, should a court need to resort to extrinsic evidence to find the "reality" of the trust's creation.

With these principles in mind, we proceed to analyze the trust transfer at issue here. The Trust instrument stated that Governor Cox transferred the 750 shares of Atlanta Journal common stock to the Trust in exchange for consideration paid by the Trustee and the decedent. As we affirmed above, the decedent alone paid the con-

sideration by executing and discharging a promissory note, which stated: "This note is given *in payment for 750 shares* of common stock of The Atlanta Journal Company" (emphasis added). Similarly, the Trust provision delineating the method of repayment on the note stated that the decedent's note was "executed and delivered to [Governor Cox] *in payment for the stock* which is the subject matter of this trust" (emphasis added). These provisions show that the Trust was arranged by the parties so that the decedent would pay consideration to Governor Cox for all 750 shares of stock. Accordingly, the decedent's note was executed in an amount determined by Governor Cox's basis in all 750 shares, again evidencing that the decedent paid for the stock which was then transferred to the Trust. During the pendency of his gift tax dispute with the IRS, Governor Cox likewise maintained that the decedent had paid the fair market value of the stock in 1941. Under the Trust documents and the other objectively verifiable circumstances surrounding the 1941 transaction, therefore, the manifest intention of the parties was that the decedent would pay for the stock, which would then be transferred into the Trust.

Under these circumstances, we conclude that it was unnecessary for the district court to consider evidence extrinsic to the transaction in an attempt to ascertain the "reality" of the trust transfer.[8] The Trust docu-

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[8] The estate asserts that control over the trust terms is an essential element to finding a "transfer" under section 2036(a). No explicit authority supporting the assertion, however, has been cited or found. In addition, the cases on which the estate relies do not purport to establish an absolute "control" requirement and are explainable on other grounds. *See Fidelity—Philadelphia Trust Co. v. Smith*, 356 U.S. 274, 78 S.Ct. 730, 2 L.Ed.2d 765 (1958); *Estate of Becklenberg v. Commissioner*, 273 F.2d 297 (7th Cir. 1959); *Estate of Cain v. Commissioner*, 37 T.C. 185 (1961); *Estate of Bergan v. Commissioner*, 1 T.C. 543 (1943), *acq.*, 1943 C.B. 2. To be sure, the courts have held that such control is a sufficient basis on which to include a trust corpus under section 2036(a), *see, e.g.*,

ments are unambiguous,[9] *cf. Estate of Shafer*, 749 F.2d at 1218 (IRS unable to determine from documents who paid for the property), and in any event, lend no support to the district court's revisionist assertion that the decedent purchased only a life estate in the Trust corpus. Nothing in the form or execution of the transaction suggests that the parties intended that decedent's consideration was in payment for anything less than the total "bundle" of rights inherent in owning property. The "nature and operative effect of the transfer," as the parties themselves arranged it and characterized it at the time, disclose that in substance the decedent paid Governor Cox for 750 shares of Atlanta Journal common stock, which were then transferred to the James M. Cox Jr. Trust. Consequently, we conclude that although Governor Cox nominally created the Trust, the decedent must be considered the effective grantor of the Trust to the extent of his contribution.[10] *See Estate of Marshall*

Estate of Shafer, 749 F.2d at 1221-22, but to our knowledge none has held it to be a necessary condition to includability. Indeed, imposition of a "control" requirement would seemingly transgress this court's admonitions that "transfer" is to be given its usual meaning, *National City Bank of Cleveland v. United States*, 371 F.2d 13, 16 (6th Cir. 1966), and is not to be restrictively interpreted, *Estate of Shafer*, 749 F.2d at 1221. We further note that in other contexts, courts have included trust property in a decedent's gross estate under section 2036(a) even though the transferor apparently had no control over the terms of the trust into which the property was transferred. *See, e.g., Estate of Kinney v. Commissioner*, 39 T.C. 728 (1963) (property transferred by life beneficiary into existing trust she did not create included in gross estate). We accordingly decline to put this gloss on the definition of transfer under the statute.

[9] Any ambiguity in this transaction concerned only *who* paid the consideration, not *what* the consideration was "in payment for." The district court, therefore, properly considered extrinsic evidence, including individual tax returns and other related correspondence, to resolve this ambiguity. *See Estate of Shafer*, 749 F.2d at 1218.

[10] The estate disputes the characterization of the transaction on the ground that the decedent could not have used Governor Cox as a

v. Commissioner, 51 T.C. 696 (1969); *Estate of Sinclaire v. Commissioner*, 13 T.C. 742 (1949); *Estate of Schwartz v. Commissioner*, 9 T.C. 229 (1947).

Since the named remaindermen were the decedent's wife and lineal descendants, the natural objects of his bounty, we have no difficulty in concluding that the decedent's contribution to the Trust was "essentially testamentary," *Estate of Grace*, 395 U.S. at 316, 89 S.Ct. at 1730, and therefore includable under section 2036(a).[11] A transfer into trust, in which the effective transferor retains a life estate, remaind to the effective transferor's heirs, is a transaction that is "too much akin to testamentary dispositions not to be subjected to the same excise," *Hallock*, 209 U.S. at 112, 60 S.Ct. at 448. *Cf. Estate of Shafer*, 749 F.2d at 1221-22. The later revaluation of the Trust corpus in resolution of Governor Cox's gift tax dispute with the IRS cannot change the "nature and operative effect of the transfer," although it does affect what portion of the Trust is includable in the decedent's gross estate. Accordingly, we hold that because the $4,666.88 paid by the decedent represented 11.3136 percent of the value of the stock transferred

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"conduit" to establish the Trust. Two observations are pertinent. First, from a legal standpoint, this argument is just a variation on the estate's assertion that the decedent must have "controlled" the Trust terms to have made a transfer under section 2036(a), an assertion we have rejected. *See supra* note 7. Second, as a factual matter, the estate's argument relies exclusively on the extrinsic evidence taken by the district court to the effect that Governor Cox was "the boss." We have already ruled, however, that this evidence was unnecessary to discover the "nature and operative effect" of the transaction. Accordingly, we reject the estate's contention.

[11] "[T]he taxing authorities need do no more than apply considered and accepted doctrine of the law of trusts to reach the conclusion that he who pays another for the creation of a trust wherein the payor shall be granted a beneficial interest . . . which he desires may be taxed as one who has transferred the property retaining an interest therein." *Newberry's Estate v. Commissioner*, 201 F.2d 874, 876-77 (3d Cir. 1953) (footnote omitted).

into the Trust in 1941, the same portion of the date-of-death value of the Trust must be included in decedent's gross estate under section 2036(a).[12]

This holding is consistent with the mandate that the term "transfer" should be interpreted to effectuate the purposes of section 2036(a). *See Estate of Shafer*, 749 F.2d at 1221-22. By paying the consideration to Governor Cox "in payment for" the stock, the decedent in substance purchased 11.3136 percent of the 750 shares of Atlanta Journal stock, or approximately 85 shares, which were then transferred into the Trust, with the remainder to his wife and children. Since the decedent was the only life beneficiary, he received the income from the 85 shares for the rest of his life. The conclusion readily follows, therefore, that the transfer did "not significantly alter [the decedent's] lifetime beneficial enjoyment" in the $4,666.88 that he purported to transfer during his

[12] Moreover, even if we were disposed to consider the district court's findings that arose from the irrelevant extrinsic evidence, we would still find the Trust corpus includable under section 2306 [sic] (a) to the extent of the decedent's contribution. Initially, it is clear that Governor Cox's transfer of the stock directly into the Trust without issuing certificates to the decedent is not dispositive. *See Estate of Shafer*, 749 F.2d at 1221 (irrelevant that the effective grantor never held legal title to property transferred into trust); *see also Commissioner v. Estate of Church*, 335 U.S. 632, 642, 69 S.Ct. 322, 327, 93 L.Ed. 288 (1949) (application of section 2036(a) not dependent on "various niceties of the art of conveyancing" (quoting *Klein v. United States*, 283 U.S. 231, 234, 51 S.Ct. 398, 399, 75 L.Ed. 996 (1931))). In addition, we would not find significant that the creation and funding of the Trust was the "sole act" of Governor Cox. In *National City Bank*, this court held that, in order to make a transfer under section 2036(a), the decedent's life estate must arise from some "affirmative" or "positive" action on the decedent's part. 371 F.2d at 16-17; *Estate of Shafer*, 749 F.2d at 1221 n. 9. As our disposition of this case indicates, we believe this requirement is satisfied by a life beneficiary's execution and discharge of a note payable to the nominal grantor in establishing a trust, at least where the remaindermen are decedent's wife and lineal descendants. Accordingly, the decedent's contribution to the Trust would still constitute a "transfer" under the statute.

lifetime. *Estate of Wyly*, 610 F.2d at 1290. The transfer is thus taxable upon decedent's death as an "essentially testamentary" transaction under section 2036(a). *Estate of Grace*, 395 U.S. at 320, 89 S.Ct. at 1733 (decedent retained a "significant interest in" the transferred property).

IV.

For the foregoing reasons, the judgment of the district court is REVERSED.

UNITED STATES DISTRICT COURT
S.D. OHIO, W.D.

No. C-3-81-041

DANIEL J. MAHONEY, JR.,
Plaintiff,

v.

UNITED STATES OF AMERICA,
Defendant.

Aug. 12, 1985

Robert P. Bartlett, Jr., Dayton, Ohio, for plaintiff.

Albert H. Turkus, D. Patrick Mullarkey, Vicki Cheikes, Tax Div., Dept. of Justice, Washington, D.C., Christopher Barnes, U.S. Atty., Cincinnati, Ohio, for defendant.

EXPANDED OPINION: FINDINGS OF FACT AND CONCLUSIONS OF LAW, SUPPORTING BRIEF OPINION FILED JUNE 21, 1985; CONFERENCE CALL SET

RICE, District Judge.

In this case, the Plaintiff, Daniel J. Mahoney, Jr., the executor of the estate of the decedent, James M. Cox, Jr., seeks a refund of federal estate taxes and deficiency interest paid by the estate, as well as interest on the amount paid. The dispute arises out of a decision by the Defendant that a portion of the value of a certain trust, created by the decedent's father, was includable in the

estate of James M. Cox, Jr., by virtue of § 2036(a) of the Internal Revenue Code of 1954. The Plaintiff paid both the tax assessed by the Defendant and the deficiency interest, and then initiated this action for a refund of said payment. Pursuant to the agreement of the parties, this Court ordered this case bifurcated. *See* Doc. #25. As a result, at the trial of this case, the Court heard evidence relating only to the includability of any portion of the trust in the estate of James M. Cox, Jr.

In this Court's brief Opinion of June 21, 1985 (Doc. #55), this Court stated as follows:

> As a starting point of analysis, the Court has concluded that the transfer of 750 shares of Atlanta Journal Company common stock by Governor Cox to the trust he created for the benefit of his son, James M. Cox, Jr., was in part a sale (11+ percent) and in part a gift (88+ percent). This case deals only with the 11+ percent that has been deemed a sale. This conclusion raised two major questions for the Court:
>
> 1. Was the sale of stock to the trust, or was it to the decedent, James M. Cox, Jr.? For reasons that will be set forth in the expanded opinion to follow, the Court has found that the decedent, James M. Cox, Jr., furnished consideration for the transfer of the stock and, therefore, has concluded that the sale was to him rather than to the trust.
>
> 2. Did James M. Cox, Jr. purchase an undivided or full ownership interest in 11+ percent of the 750 transferred shares, or did he purchase only a life estate in the transferred stock? Once again, for reasons which will be set forth in the expanded opinion, the Court has concluded that James M. Cox, Jr. purchased a life estate only.
>
> Therefore, based on the foregoing conclusions, the Court has determined that the decedent did not

transfer to the trust that property in which he retained a life estate (the 11+ percent of the 750 shares of Atlanta Journal Company common stock), and, therefore § 2036 of the Internal Revenue Code does not require the inclusion of that portion of the trust in the estate of James M. Cox, Jr. Moreover, in the Court's opinion, the principles of estoppel relied upon by Defendant do not require the inclusion of said portion of the trust in decedent's estate. Accordingly, assuming there exist no further issues to be resolved prior to judgment [1], the Court, following the telephone conference between Court and counsel, will enter judgment for Plaintiff and against Defendant in the amount of Seven Million, Nine Hundred Forty-two Thousand, Three Hundred Forty-two and 94/100 Dollars ($7,942,342.94) plus interest as provided by 28 U.S.C. § 2411 and 26 U.S.C. § 6621.

The Court now sets forth its findings of fact and its conclusions of law.

I. *Findings of Fact*

(1) In December, 1939, James Middleton Cox, Sr. ("Governor Cox"), the former Governor of Ohio and in 1920 the nominee of the Democratic Party for President of the United States, and two corporations controlled by him, The Evening News Publishing Company and Springfield Newspapers, Inc., purchased all of the outstanding stock of the Atlanta Journal Company. At the time of the purchase, the Atlanta Journal Company published a newspaper, *The Atlanta Herald*, and operated Radio Station WSB in Atlanta.

(2) After purchasing the stock of the Atlanta Journal Company, Governor Cox and his co-purchasers recapitalized the company. As a result, the two corporate, copurchasers and another corporation, affiliated with Governor Cox, received 4,950 shares of preferred stock. After a stock split, Governor Cox received all 4,000 shares

of Atlanta Journal Company common stock. Governor Cox's cost basis in these shares was $6.2225 per share.

(3) In 1941, Governor Cox created five trusts, each of which named an income beneficiary and remaindermen. The income beneficiaries of the five trusts were Margaretta Blair Cox, wife of Governor Cox; James M. Cox, Jr., Barbara Cox Anthony [1] and Anne Cox Chambers,[2] Governor Cox's three children; and Daniel J. Mahoney,[3] former son-in-law of Governor Cox. James M. Cox, Jr., was appointed trustee of the trusts created for the benefit of Margaretta Blair Cox, his step-mother and those created for the benefit of his half-sisters, Anne Cox Chambers and Barbara Cox Anthony. Robert K. Landis, Governor Cox's attorney, was appointed trustee of the trust created for the benefit of James Cox, Jr. Daniel J. Mahoney was named trustee of the trust created for his benefit and that of his children. It is the trust created for the benefit of James M. Cox, Jr. ("the James M. Cox, Jr. Trust"), which is at the center of this controversy.

(4) Governor Cox was the sole creator of these five trusts. He consulted only with his attorney, Robert K. Landis, before creating them. He alone decided who would be the remaindermen for each trust. He did not consult with the members of his family in making this decision or any other decision relating to the trusts.

(5) Governor Cox transferred 3,000 of the 4,000 shares of the Atlanta Journal common to the five trusts. The stock certificates evidencing the transferred shares of stock were issued in the following manner:

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[1] At the time of the creation of the trust, Barbara Cox Anthony's legal name was Barbara Cox.

[2] At the time of the creation of the trust, Anne Cox Chambers' legal name was Anne Cox Johnson.

[3] Daniel J. Mahoney was the father of the present Plaintiff, Daniel J. Mahoney, Jr.

Stock Certificate	Number of Shares	Transferee
1	600	James M. Cox, Jr., Trustee for Margaretta Blair Cox
2	675	James M. Cox, Jr., Trustee for Ann Cox Chambers
3	675	James M. Cox, Jr., Trustee for Barbara Cox Anthony
4	750	Robert K. Landis, Trustee for James M. Cox, Jr.
5	300	Daniel J. Mahoney, Trustee for the Mahoney Family

No stock certificates were issued to the income beneficiaries.

(6) Governor Cox considered his transfer of stock a sale for the fair market value of the stock, rather than a gift. Consequently, Governor Cox did not file a gift tax return for the transaction. Moreover, he did not report a capital gain for the sale. Rather, the amount that Governor Cox received from the sale, $6.2225 per share, was equal to Governor Cox's adjusted basis for the stock. Thus, there was no gain from the sale.

(7) In 1943, Governor Cox created another trust ("the Dayton Trust") for the benefit of his wife, his children and the family of his former son-in-law, to which he gave his shares of stock in The Evening News Publishing Company. Governor Cox considered this transaction a gift, and as a result, he filed a gift tax return for 1943. During the audit of this gift tax return, the Internal Revenue Service ("IRS") discovered the creation and funding of the 1941 trusts and insisted that Governer Cox file a gift tax return for 1941.

(8) On September 23, 1946, Governor Cox filed a gift tax return at the insistence of the IRS, in which he showed the creation and funding of the 1941 trusts; however, Governer Cox disclaimed any gift tax liability.

Governor Cox asserted that he had sold the shares of stock to the trusts rather than making a gift of same. Moreover, he contended that the sale was for fair market value.

(9) When the IRS audited this gift tax return, it concluded that the fair market value of the stock at the time of transfer was between $200 and $300 per share rather than $6.2225 per share as Governor Cox had contended. Accordingly, the IRS assessed Governor Cox for gift taxes. Subsequently, Governor Cox challenged the IRS assessment by petitioning the Tax Court. While the case was pending in the Tax Court, the parties reached a compromise in their dispute, whereby they agreed that the fair market value of the stock was $55 per share. Therefore, on November 24, 1952, Governer Cox filed an amended gift tax return, reporting the fair market value of the 3,000 shares of Atlanta Journal common which he transferred to the five trusts in 1941 at $55 per share. Therefore, Governor Cox paid the gift tax on a net gift of $146,332.50, which was arrived at by subtracting the amount Governor Cox received for the stock, $6,2225 [sic] per share, from its fair market value of the stock, $55 per share, and then multiplying the result by the number of shares involved. Governor Cox did not claim a per donee exclusion.[4]

(10) The trust that Governor Cox created for the benefit of his son, James M. Cox, Jr. ("James M. Cox, Jr., Trust") provided that:

> In consideration of $1.00 and other valuable consideration paid to the grantor by the Trustee and by James M. Cox, Jr., the grantor has sold and does hereby assign and transfer to Robert K. Landes [sic], as Trustee for James M. Cox, Jr., hereunder, 750 shares of common stock of The Atlanta Journal Company.

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[4] The amount paid, $6.2225 per share is 11.3136 percent of the the total value of the stock, $55 per share.

(11) At the time that Governer Cox transferred the stock to the James M. Cox, Jr., Trust, James M. Cox, Jr., executed a note in the amount of $4,666.88, payable to his father as consideration for the funding of the trust. The amount of the note was fixed by multiplying the number of shares of Atlanta Journal Company common stock transferred to the James M. Cox, Jr., Trust, 750, by the sale price, $6.2225 per share. Additionally, the note bore an interest rate of 4% per annum.

(12) At the time he executed the note in 1941, James Cox, Jr., was thirty-eight years of age and had sufficient assets to have paid the debt evidenced by the note immediately.

(13) A provision of the James M. Cox, Jr., Trust directed the Trustee, after paying reasonable expenses, to apply all cash dividends and other cash distributions received on the stock, to the payment of principal and interest "on the note of James M. Cox, Jr., this day executed and delivered to the grantor in payment for the stock which is the subject matter of this trust, until the note is discharged." [5]

(14) The indebtedness evidenced by the note, as well as the interest upon it, were discharged by withholding dividends, which would have been paid to the trust from the Atlanta Journal Company. Nonetheless, James Cox, Jr., treated these amounts as constructively received by him. He reported as income, on his income tax returns for the relevant years, the amounts of dividends so with-

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[5] In its entirety, the relevant portion of the trust agreement provided:

> All cash dividends and other cash distributions received on said stock, less any costs and expenses which may be properly incurred by the Trustee in the discharge of his duties as Trustee, shall be applied by the Trustee to the payment of interest or principal (or both) on the note of James M. Cox, Jr., this day executed and delivered to the grantor in payment for the stock which is the subject matter of this trust, until the note is discharged.

held. In addition, he claimed, as deductions, that portion of the withheld dividends that went to pay the interest on the note.

(15) In 1941, the James M. Cox, Jr., Trust's share of the dividends declared by the Atlanta Journal Company was $4,500. In the years 1942 through 1944, the Trust's share of dividends was $7,500 annually. The note and interest thereon were paid off in these years.

(16) In the Cox family hierarchy, Governor Cox was the "boss." He did not consult with his son about the establishment of the James M. Cox, Jr., Trust or any of the other trusts which Governor Cox created in 1941. Throughout his life, James M. Cox, Jr., expressed dissatisfaction at the fact that his father put the Atlanta Journal Company common stock in trust rather than giving it to him outright.

(17) The 1941 transfer by which Governor Cox funded the James M. Cox, Jr., Trust was a partial gift (88+ percent of the value of the stock) and a partial sale (11+ percent of the value of the stock). Governor Cox sold to his son, James M. Cox, Jr., only the right to receive for his life the income generated by the trust. The remainder of the transfer was a gift. James M. Cox, Jr., received nothing more than the right to receive income from the trust. He did not receive an undivided or full ownership interest in the transferred shares. James M. Cox, Jr., transferred nothing to the trust.

II. *Discussion*

In an action such as the present one where a taxpayer seeks a refund of federal taxes, the burden of persuasion is imposed upon the taxpayer to establish by a preponderance of the evidence that there was an overpayment of taxes. *Sinder v. United States*, 655 F.2d 729 (6th Cir. 1981). With this standard of proof in mind, the Court turns to the discussion of the issues herein.

In this case, the Court is called upon to decide whether a portion of the value of James M. Cox, Jr., Trust must be included in the estate of James M. Cox, Jr. The Government argues that § 2036(a)(1) of the Internal Revenue Code of 1954, 26 U.S.C. § 2036(a)(1) requires the inclusion of a portion of that trust in the estate. Section 2036(a)(1) provides:

> (a) General Rule.—The value of the gross estate shall include the value of all property to the extent of any interest therein of which the decendent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death—
>
> > (1) the possession or enjoyment of, or the right to the income from, the property, or, [. . . .]

In *Estate of Wyly v. Commissioner*, 610 F.2d 1282 (5th Cir. 1980), the Fifth Circuit explained the purpose of § 2036(a)(1):

> The purpose of this provision is to prevent circumvention of federal estate tax by use of inter vivos schemes which do not significantly alter lifetime beneficial enjoyment of property supposedly transferred by a decedent. *See* 74 Cong.Rec. 7078-79, 7198-99 (1931); H.R.Rep. No. 708, 72nd Cong., 1939-1 C.B. (Part 2) 457, 490-91; S.Rep. No. 665, 72nd Cong., 1939-1 C.B. (Part 2) 496, 532. The Supreme Court has recognized this purpose on several occasions. In *United States v. O'Malley*, 383 U.S. 627, 631, 86 S.Ct. 1123, 1126, 16 L.Ed.2d 145 (1966), it was stated that the section shows the intent of Congress to subject "to tax all property which has been the subject of an incomplete inter vivos transfer." In *United States v. Estate of Grace*,

395 U.S. 316, 320, 89 S.Ct. 1730, 1733, 23 L.Ed.2d 332 (1969), the Court noted:

> The general purpose of the statute was to include in a decedent's gross estate transfers that are essentially testamentary—i.e., transfers which leave the transferor a significant interest in or a control over the property transferred during his lifetime.

In accord with that authority, this Court has stated:

> [§ 2036 is] part of a Congressional scheme to tax the value of property transferred at death, whether the decedent accomplishes the transfer by will, by intestacy, or by allowing his substantial control over the property to remain unexercised until death so that the shifting of its economic benefits to the beneficiary only then becomes complete. *In Re Estate of Lumpkin*, 474 F.2d 1092, 1097 (5th Cir. 1973).

The classic case of the intended application of the Act would be a purported gift with a retained life estate in the donor.

610 F.2d at 1290-91.

There are three basic elements in § 2036(a)(1) which, if met, would require the inclusion of a portion of the James M. Cox, Jr., Trust in the estate of James M. Cox, Jr.: (1) there must be an inter vivos transfer by decedent (James M. Cox, Jr.), in trust or otherwise, other than a bone [sic] fide sale for full and adequate consideration in money or money's worth; (2) decedent (James M. Cox, Jr.) must have retained the possession, enjoyment or right to income from the property; (3) this reservation must have been for the life of James M. Cox, Jr., for a period that is not ascertainable without reference to his death or for any period which does not in fact end before his death. 3 Mertens, *Law of Federal Gift and Estate Taxation*, § 24.07.

Herein, the parties do not disagree on the second and third elements. There is no question that James M. Cox, Jr., "retained" the right to income from the James M. Cox, Jr., Trust. Moreover, there is no question that James M. Cox, Jr.'s, right to receive the income was for his life. Thus, the only question for the Court is whether the funding of the trust in question involved a transfer of property by James M. Cox, Jr., to the James M. Cox, Jr., Trust.

As a starting point for the Court's resolution of this question, the Court accepts the Government's assertion that Governor Cox funded the James Cox Trust through a partial sale and a partial gift. Indeed, the Court has reached this conclusion as a matter of fact. (See #17, *supra*). The transfer by Governor Cox of 750 shares of Atlanta Journal Company common stock to the James Cox Trust was in part a sale (11+ percent of the value of the stock) and in part a gift (88+ percent of the value of the stock). Plaintiff does not seriously question this proposition; however, to the extent that Plaintiff argues to the contrary, the Court rejects same. The evidence overwhelmingly supports the Defendant's proposition. Indeed, this is how everyone treated the transaction during Governor Cox's gift tax return dispute. This conclusion raises two major questions for the Court:

(1) Was the sale of the 11+ percent of the stock to the James M. Cox, Jr., Trust, or was it to James M. Cox, Jr.?

(2) Did James M. Cox, Jr., purchase an undivided or full ownership interest in 11+ percent of the 750 transferred shares, or did he purchase only an equitable life estate in the transferred stock?

These questions arise because of the parties' disparate views of the underlying transaction which is the genesis of this lawsuit, the funding of the James M. Cox, Jr., Trust. As stated above, Defendant views this underlying transaction as having been accomplished through a par-

tial sale and a partial gift. Defendant contends that Governor Cox sold slightly in excess of 11 percent of the 750 shares of the Atlanta Journal Company common stock to his son,[6] following which, the Defendant argues, James M. Cox, Jr., made a gift to the James M. Cox, Jr., Trust of the 11+ percent of the stock that he had purchased. Therefore, the argument concludes, James M. Cox, Jr., transferred an interest in property to the trust, within the meaning of § 2036(a), and a portion (that percentage of the initial transfer that was a sale (11+ percent))[7] of the trust must be included in his estate.[8]

Plaintiff, on the other hand, argues that if there was a sale of stock, it was to the James M. Cox, Jr., Trust rather than to the decedent, James M. Cox, Jr. Under this theory, Plaintiff argues that James M. Cox, Jr., never owned any of the 750 shares of stock, and, as a consequence, could not have transferred an interest in that property to the trust. In the alternative, Plaintiff contends that if there was a sale to the decedent of 11+ percent of the value of the 750 shares of stock transferred to the trust, James M. Cox, Jr., purchased nothing more than the right to receive income from the trust over the direction of his lifetime, rather than an un-

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[6] The remaining 88+ percent of the transferred stock is treated as a gift by Governor Cox to the James M. Cox, Jr., Trust and is not a subject of this litigation.

[7] In the deficiency notice that it issued, the IRS asserted that $5,520,296.00 of the James M. Cox, Jr., Trust was includable in the estate of James M. Cox, Jr. The IRS arrived at this figure by excluding from the value of the trust at the time of Cox's death that portion of the trust which was attributable to the distribution from the Margaretta Cox Trust. The resulting figure was multiplied by 11.3136 percent, which is the percentage of the initial funding of the trust which was a "sale" rather than a "gift."

[8] Alternatively, Defendant argues that the Plaintiff is estopped to deny that James J. [sic] Cox, Jr., transferred 11+ percent of the 750 shares of Atlanta Journal Company common stock to the trust. The Court will discuss the Defendant's estoppel argument after its discussion of the two questions set forth above.

divided or full ownership interest in the 11+ percent of the transferred shares. Under this theory, as with Plaintiff's alternative theory, the decedent could not have transferred any property to the trust since all he had received for his consideration was the right to receive income from the shares so transferred throughout his lifetime.

For reasons that follow, and based upon the Court's findings of fact, this Court concludes that the sale that occurred in 1941 was to James M. Cox, Jr., and not to the James M. Cox, Jr., Trust. However, the Court concludes that James M. Cox, Jr., received nothing more from his father than the right to receive the income generated by the trust, and the stock transferred thereto, for his life. James M. Cox, Jr., did *not* purchase an undivided or full ownership interest in 11+ percent of the 750 shares of Atlanta Journal Company common stock which he then transferred to the trust by gift. Rather, he purchased an equitable life estate in the transferred shares. As a consequence, the Court concludes that James M. Cox, Jr., did not transfer an interest in property to the trust and that § 2036(a) does not require the inclusion of a portion (11+ percent) of the value of the James M. Cox, Jr., Trust in his estate.

The Plaintiff contends that the 1941 sale was to the trust rather than to James M. Cox, Jr., because the trust was primarily responsible for furnishing consideration in exchange for the transferred stock. Plaintiff would have the Court conclude that the decedent acted as merely a surety to guarantee the debt to Governor Cox, which the trust had incurred in exchange for the transfer of the stock. The trust agreement itself recites that the consideration was paid to the grantor, Governor Cox, by the trustee and James M. Cox, Jr., *See* Jt. Ex. I. Moreover, the trust agreement provided that dividends received by the trust would initially be used to retire the note that James M. Cox, Jr., had executed and delivered to the grantor. *See, id.* Additionally, Plaintiff

points to the fact that the note that the decedent signed, or a copy thereof, is not available. Hence, it is not possible to determine whether the decedent signed the note as a maker, evidencing his own personal debt, or as a surety, guaranteeing the trust's debt.

If this were the only evidence before this Court, a plausible inference to be drawn would be that the trust furnished the consideration for the sale of the stock and the decedent was merely a guarantor of its debt. Nonetheless, an equally plausible inference is that the decedent furnished the consideration and that the provision requiring that dividends initially be paid to retire the decedent's note was placed in the trust to guarantee the debt incurred by the decedent. Under those circumstances, the Court would be compelled to conclude that the Plaintiff had not met his burden of proving by a preponderance of the evidence that there was an overpayment of taxes and that he is entitled to a refund.

However, that is not all of the evidence. There is strong circumstantial evidence, in the form of letters to and from the decedent (Defendant's Exs. D, E and F) and from the fiduciary tax returns for the trust (Defendant's Exs. J, K and L) which supports the Court's finding of fact that the decedent reported all dividends that went to pay the principal and interest of the note as income and that he took a deduction for the interest that was paid. Simply stated, the decedent treated the amounts that were retained to discharge his indebtedness as constructively received by him. Under these circumstances, the Court concludes that James M. Cox, Jr., rather than the trust, furnished the consideration for that part of the transfer of 750 shares of Atlanta Journal common stock which was a sale.

This conclusion leads to the second question posited by the Court: Did James M. Cox, Jr., purchase an undivided or full ownership interest of 11+ percent of the transferred stock or did he purchase merely the right to

receive income from the trust? Implicit in the Defendant's theory of the case is the assertion that James M. Cox, Jr., purchased an undivided or full ownership interest of 11+ percent of the stock of which he made a gift to the trust, which would, therefore, be includable in his estate. To the contrary, Plaintiff argues that James M. Cox, Jr., purchased only an equitable life estate in the trust, the right to receive income from it, and that, therefore, that portion of the trust need not have been included in his estate.

In this Court's opinion, the Defendant's position ignores the reality of the creation and funding of the James Cox Trust. The reality is that the creation and funding of the trust was the act of Governor Cox, not his son. An examination of the language of the trust agreement leads, among other things, to this conclusion. The agreement provided that the grantor, Governor Cox, transferred 750 shares of Atlanta Journal Company common stock to the trustee who was to hold legal title to same and all incidents of ownership thereto. The stock was transferred directly to the trust; no stock certificates were issued to the decedent.[9] Furthermore, Governor Cox was "the boss." He dominated his family and the conduct of his business affairs. If not domineering, he was at least the dominating figure in the lives of his family. Governor Cox consulted only with his attorney when he established the James M. Cox, Jr., Trust and the other four trusts in 1941. He did not consult with the decedent or with other members of his family before creating the trusts. The remaindermen of the James Cox Trust were chosen by Governor Cox without input from

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[9] This is not to suggest that a two-step transaction, with the issuance of stock certificates to the decedent which he, in turn, issued to the trust, is necessary before there is a transfer within the meaning of § 2036(a). *Estate of Shafer v. Commission*[er], 749 F.2d 1216 (6th Cir. 1984), precludes such a suggestion. Rather, this is merely further evidence to the Court that Governor Cox, rather than the decedent was the sole creator of the trust.

the decedent. The remaindermen of the James Cox trust are the same as those of the trust created in 1943, the Dayton Trust. Finally, it must be remembered that the property that funded the trust was that of Governor Cox, and the decedent had no legal claim to it.

In short, Governor Cox created the James Cox Trust; he funded it; and named the remaindermen. All that James M. Cox, Jr., received in exchange for the consideration he furnished was the right to receive income for his life. He did not receive an undivided-or full ownership interest in the 11+ percent of the stock in question. James M. Cox did not transfer an interest in property to the trust because he had not received anything other than the right to receive income for his lifetime. Accordingly, the Court concludes that James M. Cox, Jr., did not transfer property to the trust, as that term is used in § 2036(a).

In reaching this conclusion, the Court has not applied the term "transfer" in a restrictive manner, nor has it violated the Supreme Court's directive that § 2036 "taxes not merely those interests which are deemed to pass at death according to refined technicalities of the law of property." *Helvering v. Hallock*, 309 U.S. 106, 112, 60 S.Ct. 444, 448, 84 L.Ed. 604 (1940). Nonetheless, where ownership of an interest in property is never acquired, it cannot be transferred. *See, e.g.*, 2 Mertens, *supra*, at §§ 20.11-20.12. Herein, the Court has held that the decedent acquired nothing more than an equitable life estate; therefore, he had nothing to transfer.

Additionally, the present dispute is distinguishable from those decisions in which courts have held that a person who furnishes consideration in exchange for the creation of a trust by another makes a transfer within the meaning of § 2306(a). *See, e.g., Estate of Dora Marshall*, 51 T.C. 696 (1969).[10] In this case, this Court

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[10] In *Estate of Dora Marshall*, the court concluded that there was a § 2036(a) transfer because the nominal settlor created the trust

has concluded that James M. Cox, Jr., furnished consideration only for right to receive income from the trust, not for the creation of the trust itself.

Similarly, *Estate of Shafer v. Commissioner*, 749 F.2d 1216 (6th Cir. 1984), is not contrary to the conclusion reached herein. In *Estate of Shafer*, the decedent was found to have furnished the entire consideration for a lot. The lot was transferred by deed for life to the decedent and his wife with the remainder to the decedent's children. The Sixth Circuit concluded that the decedent had made a § 2036 transfer even though he did not make a transfer as that term is defined by property law concepts. The Sixth Circuit accepted the Tax Court's finding that the decedent directed the grantors of the lot to execute the deed so as to convey the remainder interest to his children. Therefore, an application of the familiar rule that the substance of a transaction shall control its form led to the conclusion that there had been an [sic] § 2036(a) transfer. Herein, the decedent had no role in the creation of the James M. Cox, Jr., Trust. He did not tell his father how the trust should be set up or who should be its beneficiaries. He merely furnished a note in the amount of $4,666.88 in exchange for the right to receive income from the trust for his life. If this Court had found that the decedent furnished consideration for funding the entire trust, or that portion of the trust which represents 11+ percent of its value, the Court

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in exchange for the decedent relinquishing a debt owed to her by the settlor. 51 T.C. at 701. The court therein pointed out that this was the type of transfer that § 2036 was intended to reach because the decedent's estate was depleted by the amount of the debt that was relinquished. *Id.* at 702. In this case, two factors distinguish the present case from *Estate of Dora Marshall*. Therein, the decedent relinquished a debt in exchange for the creation of the trust; whereas, herein, the Court has concluded that the decedent furnished consideration, the note, for the right to receive income rather than furnishing consideration of the creation of the trust. Moreover, the transaction herein did not diminish James M. Cox's estate. On the contrary, it greatly enhanced it.

would conclude that a portion of the trust would have been includable in the estate of James M. Cox, Jr.

The Defendant also raises an estoppel argument, the parameters of which are set out below. The doctrine of equitable estoppel applies in tax cases when "[t]he taxpayer, by his conduct which includes language, acts or silence knowingly makes a representation or conceals material facts which he intends or expects will be acted upon by taxing officials in determining his tax." *Robinson v. Commissioner*, 100 F.2d 847, 849 (6th Cir. 1939). Moreover, the facts which the taxpayer represents or conceals by his conduct to the taxing officials must be either unknown to those officials or such that the taxing officials do not have the same access to the facts as the taxpayer. *Id.* Furthermore, the facts so represented or concealed must have caused the loss of taxes to the government. *Id.*

Specifically, Defendant argues that Plaintiff is estopped from arguing that the 1941 transaction, by which the James M. Cox, Jr., Trust was funded, was a gift from Governor Cox to the trust rather than a bone [sic] fide sale to his son, the decedent. *See* Doc. #37 at 17-18. In deciding this case, the Court has found that there was a sale of 11+ percent of the value of the 750 shares of Atlanta Journal Company common stock to the decedent, James M. Cox, Jr. The Defendant does *not* argue that Plaintiff is estopped from arguing that James M. Cox, Jr., purchased the right to receive income generated by the James M. Cox, Jr., Trust from his father. The Defendant has presented the Court with no reason why the question of whether James M. Cox, Jr., purchased an undivided or full ownership interest in 11+ percent of the 750 shares of stock that were transferred to the trust, rather than the right to receive the income generated by the trust, was relevant to the gift tax controversy between Governor Cox and the IRS. In other words, even assuming, *arguendo*, that the decedent concealed from the IRS the fact that he purchased nothing more than the right to receive income generated by the

trust, there is absolutely no indication that the decedent intended or expected the IRS to act upon his concealment or that the IRS did in fact act upon same. Under these circumstances, the Court concludes that Plaintiff is not estopped from arguing that James M. Cox, Jr., purchased nothing more than the right to receive income generated by the James M. Cox, Jr., Trust.

III. *Conclusions of Law*

(1) This Court has jurisdiction over the subject matter of this dispute under 28 U.S.C. § 1346(a)(1).

(2) The decedent James M. Cox, Jr., furnished consideration in the form of a note for $4,666.88 with an annual interest rate of 4 percent, to Governor Cox in exchange for the right to receive for life the income generated by the James M. Cox, Jr., Trust.

(3) James M. Cox, Jr., did not make a transfer, as that term is used in § 2036(a) of the 1954 Internal Revenue Code, of an interest of property.

(4) In the absence of the transfer of an interest in property, § 2036(a) does not require the inclusion of the value of that property in a gross estate.

(5) Plaintiff has met his burden of proving by the preponderance of the evidence that he overpaid the estate taxes for the estate of James M. Cox, Jr.

(6) Plaintiff is entitled to a refund of $7,942,342.94 [11] of which $6,250,009.01 is tax, and the balance deficiency interest, together with interest on the amount paid, as provided by 28 U.S.C. § 2411 and 26 U.S.C. § 6621.

IV. *Further Procedures*

(1) Counsel for the Plaintiff will have ten (10) *calendar* days following receipt of this Opinion, etc., within

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[11] This amount was arrived at by adding the amount of the estate tax assessed, $6,250,009.01, to the deficiency interest, $1,692,333.92. *See* Uncontroverted Fact #19, Doc. #41 at 6.

which to propose *additional* findings of fact and/or conclusions of law or to suggest any deletions of same from this opinion, etc. Counsel for Defendant shall have five (5) *calendar* days, after receipt of such suggested additions or deletions, in which to object to same.

(2) In its Opinion of June 21, 1985 (Doc. #55), as well as in the Opinion herein, this Court has referred to the bifurcation order entered on February 5, 1982. The Court is convinced that there are no further issues to resolve, notwithstanding the bifurcation order. Nonetheless, the Court has scheduled a *telephone conference call* at 4:30 p.m. on Wednesday, August 28, 1985, for the sole purpose of eliciting the opinions of counsel regarding any outstanding issues. Assuming no such issues remain, the Court will thereafter enter final judgment in conformity with its Findings of Fact and Conclusions of Law, to wit: in favor of the Plaintiff, and against the Defendant herein, in the amount of $7,942,342.94, plus interest at the prevailing rate authorized by law (28 U.S.C. § 2411 and 26 U.S.C. § 6621).

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 86-3086

DANIEL J. MAHONEY, JR., Executor of the Estate of James M. Cox, Jr.,
Plaintiff-Appellee,
v.

UNITED STATES OF AMERICA,
Defendant-Appellant.

ORDER

[Filed March 8, 1988]

BEFORE: KENNEDY and NORRIS, Circuit Judge.*

Appellee has moved the Court to modify its opinion and the mandate issued pursuant thereto. The Attorney General for the State of Ohio and Betty Cox Holland have filed motions to be permitted to file briefs amicus curiae in support of appellee. The motions to file briefs amicus curiae are GRANTED.

Upon consideration of the motion to modify the panel's opinion and the mandate and of all briefs filed in connection with said motion, it is hereby DENIED.

ENTERED BY ORDER
OF THE COURT

/s/ John P. Hehman
Clerk

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* Judge Celebrezze, the author of the Court's opinion in this case, did not participate in the consideration of any of the motions which are the subject of this order.

No. 87-1521

In the Supreme Court of the United States

OCTOBER TERM, 1987

DANIEL J. MAHONEY, JR., EXECUTOR OF THE ESTATE OF JAMES M. COX, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the decedent's transfer of property to a trust in which he retained a life interest was "a bona fide sale for an adequate and full consideration" within the meaning of Section 2036(a) of the Internal Revenue Code,[1] thereby exempting the property from inclusion in the decedent's gross estate for federal estate tax purposes.

1. In 1941, the decedent's father established a trust and funded it with 750 shares of the common stock of the Atlanta Journal Company. The trust instrument named the decedent as life beneficiary and his wife and children as remaindermen. Concurrently, the decedent executed a promissory note to his father, which recited that it was in payment for 750 shares of common stock of the Atlanta

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[1] Unless otherwise noted, all statutory references are to the Internal Revenue Code of 1954 (26 U.S.C.), as amended (the Code or I.R.C.).

Journal Company. The promissory note was in the amount of \$4,666.88, the equivalent of \$6.2225 for each of the 750 shares, which had been their basis in the hands of the father. Thereafter, the Commissioner asserted that the stock was worth at least \$200 per share at the time it was transferred to the trust, and that the father therefore owed gift tax on the transfer. The gift tax dispute was compromised in 1952, the father and the Commissioner agreeing that the fair market value of the stock at the time of the transfer was \$55 per share, or a total of \$41,250 for 750 shares. The father thereafter reported and paid gift tax on a gift of \$36,583, reflecting the agreed value of the stock in 1941 (\$41,250) less the consideration (\$4,666.88) that the decedent paid for the stock. Thus, in light of the compromise, the amount paid by the decedent equalled 11.3136% of the 1941 fair market value of the stock, the equivalent of 85 of the 750 shares; the remaining 88.6864%, or 665 shares, represented his father's gift to the trust. Pet. App. 2a-4a, 21a-22a.

The decedent died in 1974. On the estate tax return, no part of the trust property was included in the gross estate for federal estate tax purposes. On audit, the Commissioner reasoned that the decedent had provided consideration for 85 of the shares that had been conveyed to the trust in 1941 and thus in substance had "made a transfer" to the trust of those shares, reserving a life interest therein. Accordingly, the Commissioner concluded that the date-of-death value of those 85 shares (*i.e.*, 11.3136% of the total value of the trust property), which was \$5.5 million, must be included in the decedent's gross estate under Section 2036(a) of the Code,[2] and the Commissioner asserted

[2] Section 2036(a) provides in pertinent part:

The value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has

an estate tax deficiency on that basis. Petitioner paid the deficiency and then filed an administrative claim for refund, which was denied. He then brought this refund action in the United States District Court for the Southern District of Ohio, contending that Section 2036(a) was inapplicable on the theory that the decedent had not "made a transfer" to the trust within the meaning of that provision, but rather that any transfer had been made by his father. Pet. App. 3a-4a.

2. a. The district court ruled in favor of petitioner (Pet. App. 17a-36a; 628 F. Supp. 273). The court observed that "the only question" was whether the funding of the trust involved a "transfer" by the decedent for purposes of Section 2036(a) (Pet. App. 27a). Using the valuation assigned to the stock in the 1952 gift tax settlement, the court found that the conveyance of stock to the trust by the decedent's father was "in part a sale (11+ percent of the value of the stock)" and "in part a gift (88+ percent of the value of the stock)" (*ibid.;* see also *id.* at 18a-24a). The court also found that the decedent had furnished the consideration for the portion of the transaction that was a sale (*id.* at 27a-30a). The court found, however, that the decedent had purchased from his father only a life estate in the stock, rather than an interest in fee. Since the decedent therefore had no remainder interest to convey and he retained the right to the income from the stock even after it was transferred to the trust, the court concluded that he

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at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death—

(1) the possession or enjoyment of, or the right to the income from, the property * * *.

had not "made a transfer" of an interest in property that would bring Section 2036(a) into play. Pet. App. 29a-35a.

b. The court of appeals reversed (Pet. App. 1a-16a; 831 F.2d 641). Like the district court, the court of appeals noted "[t]he only issue" was whether the decedent had "made a transfer" within the contemplation of the statute (Pet. App. 9a). The court of appeals agreed with the trial court's finding that, in light of the 1952 settlement, the decedent's father had conveyed a portion of the stock to the trust as a sale, and had conveyed the other portion to the trust as a "taxable gift" (*id.* at 3a-4a & n.3). Unlike the district court, however, the court of appeals deemed the decedent to be "the effective grantor of the Trust" to the extent of the consideration he paid, reasoning that the economic effect of the transactions was the same as if the decedent had purchased 85 shares of stock from his father and then had conveyed them to the trust himself (*id.* at 13a-16a). Rejecting the district court's "revisionist assertion that the decedent purchased only a life estate in the Trust corpus," the court of appeals found that "[n]othing in the form or execution of the transaction suggests that the parties intended that decedent's consideration was in payment for anything less than the total 'bundle' of rights inherent in owning property" (*id.* at 13a).

The court of appeals further explained that it "ha[d] no difficulty" in characterizing the transactions as " 'essentially testamentary,' " because the named remaindermen of the trust were the decedent's wife and children, "the natural objects of his bounty" (Pet. App. 14a, quoting *United States* v. *Estate of Grace*, 395 U.S. 316, 320 (1969)). The court then observed that the revaluation of the trust property in the gift tax dispute did not change the " 'nature and operative effect of the transfer,' " although it did change the percentage of the trust that is includable in the gross estate (Pet. App. 14a). The court held that,

because the $4,666.88 paid by the decedent represented 11.3136% of the stock as revalued, "the same portion of the date-of-death value of the Trust must be included in decedent's gross estate under Section 2036(a)" (*id.* at 14a-15a (footnote omitted)).

c. On December 30, 1987, 75 days after the court of appeals' decision, petitioner moved the court to modify its opinion and mandate. He did not contest the court's holding that the decedent had "made a transfer" of stock to the trust. Instead, petitioner raised a new claim not previously made in the court of appeals, namely, that the decedent's "transfer" to the trust was excepted from the reach of Section 2036(a) as "a bona fide sale for an adequate and full consideration in money or money's worth." Petitioner urged that this question should be considered in the first instance by the district court on remand. To that end, he requested the court of appeals to change its mandate from "reversed" to "reversed and remanded for further proceedings" and to add the following sentence to its opinion: "We express no opinion on whether the transfer falls within the scope of the bona fide sale exception to Section 2036(a)" (Motion to Modify Opinion and Mandate 9-11). The court of appeals denied the motion (Pet. App. 37a).

3. Petitioner does not challenge in this Court the court of appeals' resolution of the issue presented to it on appeal. Rather, he limits his challenge to the resolution of the estate tax dispute to the contention that the "bona fide sale" exception should apply. Thus, petitioner contends that this Court should grant certiorari to decide the merits of a contention not considered by either court below and not even presented to the court of appeals until a motion to modify filed 75 days after the entry of the court's decision. There is no reason for this Court to depart from its usual course of proceedings and accede to such an extraordinary request.

To the extent that petitioner is asking this Court to review the procedural question whether the court of appeals should have granted the motion to clarify, his submission is also entirely without substance. The court of appeals was quite correct in denying petitioner's belated request to consider an argument that could and should have been raised in the regular course of proceedings. In any event, there is no merit to the new contention that petitioner belatedly seeks to raise. Thus, the court of appeals correctly held that part of the trust corpus is includable in the gross estate under Section 2036(a). Its decision does not conflict with any decision of this Court or of another court of appeals, and there is no reason for further review of the judgment below.

a. Petitioner does not dispute the court of appeals' conclusion that the decedent "made a transfer" within the meaning of Section 2036(a), which he acknowledges was the only issue considered by the courts below. Petitioner's sole contention on the merits (Pet. 6-12) is that the Court should grant review to consider another argument—namely, that this transfer falls within the statutory exception contained in Section 2036(a) for "a bona fide sale for an adequate and full consideration." Petitioner acknowledges that he did not raise this contention on appeal. Instead he brought this argument to the court of appeals' attention for the first time in a motion to modify the court's opinion and mandate, seeking to have the court of appeals declare this issue open for consideration in the first instance by the district court on remand.

It is well settled that, absent exceptional circumstances, this Court will not consider an argument that was not presented to or considered by the court of appeals. See, *e.g.*, *United States* v. *Lovasco*, 431 U.S. 783, 789 n.7 (1977); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *Duignan* v. *United States*, 274 U.S. 195, 200

(1927). Plainly, therefore, the Court will not grant certiorari when the primary question presented in the petition is one that was not presented to or considered by the court of appeals. Petitioner advances no exceptional circumstances that warrant a departure from this settled rule, and accordingly the petition should be denied for that reason alone.

b. Petitioner also appears to contend (Pet. 12-18) that this Court should grant certiorari to determine whether the court of appeals erred in denying the motion to modify its opinion. This contention is plainly without merit. First, the question whether a particular court of appeals opinion should be modified is not ordinarily one that has much significance beyond the particular case, and petitioner does not explain what broad legal issue is presented by this contention that warrants the attention of this Court. In any event, the court of appeals acted quite properly in denying the motion.

The issue before the district court was whether a portion of the trust corpus is includable in the gross estate of the decedent under Section 2036(a). Petitioner now states that there are two possible arguments on that score based on different parts of Section 2036(a). Petitioner could argue that the decedent did not "make a transfer" at all within the meaning of Section 2036(a) or, alternatively, that any transfer fell within the exception for a "bona fide sale." Petitioner is plainly mistaken in suggesting that, after the district court accepted the first argument and the government appealed, petitioner was not obligated to present the second argument to the court of appeals in order to preserve it.

The issue on appeal was the applicability of Section 2036(a), and it was incumbent upon petitioner to present the court of appeals with all of its arguments on that issue, including arguments that the district court did not need to

reach. There would have been nothing untoward in appellate consideration of such alternative arguments; as petitioner notes (Pet. 15 n.15), it is well settled that a party may present, and an appellate court may rely upon, an alternate ground for affirmance. What is inappropriate is for petitioner to assert that he has the right, in the name of "efficiency" (Pet. 17), to raise on separate appeals each of his arguments about the statute at issue, so long as the different arguments relate to different phrases in the statute. Petitioner was obligated to present to the court of appeals all of his arguments about the issue before the court, the applicability of Section 2036(a), and thus to give the court of appeals the opportunity to decide whether it wished to address all of those arguments or instead to remand the case for the district court to address some of them.

Thus, petitioner was clearly delinquent in not raising the "bona fide sale" argument before the court of appeals if he wished to preserve the issue. His motion to clarify was essentially equivalent to a petition for rehearing based upon a new argument (and an untimely petition, at that, since it was filed 75 days after the court of appeals' decision was entered). The court of appeals manifestly acted well within its discretion in declining to rehear the case, or to invite the district court to rehear it, based on this belated contention.

c. At all events, even if petitioner had preserved the "bona fide sale" argument on appeal, there would be no reason for this Court to grant certiorari to review that issue because petitioner's argument lacks merit. Petitioner maintains that, focusing "on the economic impact of the transaction as a whole" (Pet. 10), the decedent's estate was not depleted by the transaction and therefore any transfer to the trust must be regarded as a bona fide sale. Specifically, petitioner points to the fact that the decedent ended up with a life estate in the entire corpus of the trust.

Arguing that the value of a life estate in the 665 shares given by his father to the trust was greater than the value of the 85 shares that the decedent transferred to the trust, petitioner maintains that the transfer must be viewed as falling within the "bona fide sale" exception to Section 2036(a).

This analysis of the transactions forming the trust is untenable. The obvious purpose of the "bona fide sale" exception is to relieve from the estate tax those transfers in which the transferor receives an equivalent amount of consideration in exchange. See, *e.g.*, *Merrill* v. *Fahs*, 324 U.S. 308 (1945); *Estate of Frothingham* v. *Commissioner*, 60 T.C. 211, 214-216 (1973). For example, in *Estate of Davis* v. *Commissioner*, 440 F.2d 896 (3d Cir. 1971), upon which petitioner relies (Pet. 8-9), the decedent established a trust for his wife as part of a separation agreement. The court found that the transfer was "in consideration of [the wife's] relinquishing her right of support" (440 F.2d at 898 (internal quotation omitted)). Similarly, in several cases involving widow's elections in community property states (cited at Pet. 7-9), the courts have found that a portion of the transfer of the widow's share to a trust need not be included in her gross estate under Section 2036 because the transfer is made in consideration of the husband's making a similar transfer of his half of the community property.[3]

[3] See, *e.g.*, *Estate of Christ* v. *Commissioner*, 480 F.2d 171 (9th Cir. 1973); *United States* v. *Gordon*, 406 F.2d 332 (5th Cir. 1969); *Estate of Vardell* v. *Commissioner*, 307 F.2d 688 (5th Cir. 1962); *Gradow* v. *United States*, 11 Cl. Ct. 808 (1987). The widow's election basically involves a devise by one spouse of the entire community property to a trust for the lifetime benefit of the other spouse, subject to the proviso that the surviving spouse shall take nothing under the will unless she agrees to let her share of the community property also pass under the will (and hence to the trust). The spouse thus gives up her own share in the community property in accepting such a bequest of a life estate.

Whether or not the "widow's election" cases are correctly decided,[4] it is apparent that they lend no support to petitioner's argument here. The cases relied upon by petitioner are cases in which a property interest was found to have passed to the decedent as consideration for a transfer by him. Here, as both courts below recognized, it was agreed that the 665 shares in question passed from the decedent's father to the trust as a gift, and he paid gift tax upon that transfer. A donative transfer is, by definition, the opposite of a bargained-for exchange; plainly, a gift cannot be part of "a bona fide sale for an adequate and full consideration" within the meaning of Section 2036(a). Thus, petitioner is mistaken in asserting that the exception to Section 2036(a) applies whenever a decedent ends up better off after a series of transactions that include a transfer with reserved life estate. That is simply not the case if one of the transactions is a gift to him.[5]

The courts that have considered this question have recognized that the surviving spouse has "made a transfer" of her half of the property to the trust, with a reserved life estate. This transfer triggers the application of Section 2036(a), but the courts have also held that this transfer by the widow is in consideration of the husband's transfer to her of a life estate in his half of the property that is given to the trust. Accordingly, the courts have allowed her transfer to be offset by the consideration that she is deemed to have received.

[4] These decisions have been criticized as permitting avoidance of the estate tax in a situation that should be treated as a testamentary transfer. See Lowndes, *Consideration and the Federal Estate and Gift Taxes: Transfers for Partial Consideration, Relinquishment of Marital Rights, Family Annuities, the Widow's Election, and Reciprocal Trusts*, 35 Geo. Wash. L. Rev. 50, 65-84 (1966).

[5] Thus, petitioner's suggestion (Pet. 6) that the decision below creates a conflict in the circuits with the widow's election cases is clearly specious for two independent reasons — first, because the court of appeals did not consider or discuss petitioner's argument and, second, because even an explicit rejection of that argument would not conflict with any decision of another court of appeals.

The court of appeals decision that involves a situation most closely analogous to this one strongly counsels rejection of petitioner's argument. In *Giannini* v. *Commissioner*, 148 F.2d 285 (9th Cir.), cert. denied, 326 U.S. 730 (1945), each of three children held a life interest in a family trust. Each of the children had contributed 9.25% of the property in the trust, and their parents had made a gift of the balance. The court of appeals rejected the argument that the 9.25% interest transferred by one of the children was not includable, upon his death, in the gross estate under Section 2036(a), on the theory that the transfer was made in exchange for the parents' contribution to the trust and therefore qualified as a "bona fide sale." The court of appeals agreed with the estate that the decedent's total income interest in the trust was worth more than the 9.25% of the property that he himself had transferred, but the court ruled that the "bona fide sale" exception did not apply because the parents' transfer to the trust was a gift. The court explained (148 F.2d at 287): "The disproportionate value of the interest received resulted, however, not from bargaining but from the largess of the parents in donating a substantial sum for their children's financial security." Similarly here, any net benefit that the decedent derived from the transactions creating the trust resulted from his father's gift, not from a bona fide sale. See also *Mollenberg's Estate* v. *Commissioner*, 173 F.2d 698, 701 (2d Cir. 1949); *Phillips* v. *Gnichtel*, 27 F.2d 662, 665 (3d Cir. 1928); *Estate of Schwartz* v. *Commissioner*, 9 T.C. 229, 238 (1947).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

MAY 1988

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No. 87-1521

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

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v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

JOINT BRIEF OF AMICI CURIAE STATE OF OHIO AND JAMES M. COX, JR. FOUNDATION, INC. IN SUPPORT OF PETITION

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JOINT BRIEF OF AMICI CURIAE STATE OF OHIO AND JAMES M. COX, JR. FOUNDATION, INC. IN SUPPORT OF PETITION

THE INTERESTS OF AMICI CURIAE [1]

The consequences of this case extend far beyond its immediate parties. The Sixth Circuit's ruling has a significant adverse effect on the citizens of the State of Ohio and the James M. Cox, Jr. Foundation, Inc. ("Foundation"), an Ohio charitable trust Decedent established in 1969. As a result of language in the Sixth Circuit's opinion holding that stock "transferred" to the James M. Cox, Jr. Trust ("Trust") "must be included" in the gross estate of James M. Cox, Jr. ("Decedent"), the funding for the Foundation could be eliminated, prevent-

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[1] Written consents as required by Rule 36 of the Supreme Court Rules for the filing of this brief were obtained and are on file in the Clerk's office. The decision below is reported at 831 F.2d 641.

ing the citizens of Ohio from receiving the benefits which they otherwise would receive.

The Sixth Circuit ruled that the value of certain stock placed in the Trust by former Governor of Ohio James M. Cox, Sr. ("Governor") for the benefit of Decedent must be included in Decedent's gross estate under Section 2036(a) of the Internal Revenue Code of 1954. There is an exception in the statute, however, for transfers that are exchanges for "an adequate and full consideration." Because the district court had not ruled on, and the Sixth Circuit had not addressed, whether the statutory exception applied to the transaction, the James M. Cox, Jr. Estate ("Estate") filed a motion in the Sixth Circuit seeking clarification of the statement in the court's opinion that the stock "must be included" in Decedent's estate. The State of Ohio filed an *amicus curiae* brief in the Sixth Circuit supporting the Estate's motion, arguing "that the Estate [should] have its 'day in court' on remand, on the question of whether the [exception] applies to its case." [2] However, the Sixth Circuit denied the Estate's motion without explanation.

The Sixth Circuit's ruling in this case could cause a significant reduction and perhaps elimination of funding for the Foundation.[3] If allowed to stand, the ruling

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[2] The State of Ohio requires its Attorney General to oversee charitable trusts benefitting Ohio citizens. The Attorney General of Ohio is authorized by Ohio Revised Statute Section 109.25 to "intervene in any judicial proceeding affecting a charitable trust when he determines that the public interest should be protected in such proceeding."

[3] The Foundation currently has approximately $6,000,000 in assets, virtually all coming from a single distribution from the Estate. This distribution was permitted by Decedent's spouse subject to certain conditions, including (1) that disbursements from the Foundation be limited to income on the principal, and (2) that the distribution be returned to the Estate to the extent there is a final judicial determination that the Foundation is not entitled to it.

[Continued]

will increase Decedent's taxable gross estate, and consequently the Estate's tax liability. Substantially all of this liability, asserted by the Internal Revenue Service to be approximately $6,900,000, would be borne by the portion of Decedent's estate that funds the Foundation.[4] Therefore, the citizens of the State of Ohio would be deprived of the benefits provided by the Foundation. In addition, as a result of the ruling below, taxpayers in the Sixth Circuit would be treated differently from taxpayers elsewhere.

SUMMARY OF ARGUMENT

The Sixth Circuit ignored established rules of judicial procedure in reversing without remanding the case to the district court for consideration of the Section 2036(a) exception issue. The Sixth Circuit's failure to remand denies the parties the opportunity to be heard on the applicability of the exception in light of the Sixth Circuit's ruling that Decedent "transferred" stock to the Trust. The Sixth Circuit improperly usurped the district court's fact-finding role.

Further, this Court's decision in *United States v. Estate of Grace*, 395 U.S. 316 (1969), established that a transaction involving several constituent parts must be

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[3] [Continued]

The Foundation has disbursed over $300,000 to charities in Ohio since its creation.

[4] Decedent's Last Will and Testament provides that half his adjusted gross estate shall go to his surviving spouse and that the residue, after all estate, inheritance, transfer and similar taxes are paid, shall go to the Foundation. The Will does not contemplate the possibility that a portion of the Trust would be includable in Decedent's gross estate.

Moreover, Decedent's surviving spouse has taken the position that if the value of 11.3136 percent of the stock is included in Decedent's gross estate, she is entitled to an enhanced interest because her bequest is for one half of Decedent's adjusted gross estate. If this position prevails, the funds to be distributed to the Foundation could be further reduced or eliminated.

considered in its entirety to determine its ultimate economic impact for purposes of federal estate taxation. Numerous circuit courts have applied this basic principle to the exception in Section 2036(a) to determine whether "an adequate and full consideration" was received in exchange for a transfer to trust with a retained life interest. The ruling of the Sixth Circuit in this case conflicts with this principle by treating the transaction among the Governor, Decedent and the Trust as several separate transactions for purposes of applying the statutory exception. This Court should address the Sixth Circuit's failure to follow the decision in *Estate of Grace*.

The Sixth Circuit's ruling also creates a conflict among the circuits regarding the applicability of the statutory exception to integrated transactions. This conflict places taxpayers in the Sixth Circuit on a footing different from taxpayers in other circuits, resulting in a lack of uniformity and the unfair treatment of taxpayers in Ohio and other states. Moreover, the conflict creates inefficiency in the administration of federal estate taxation.

ARGUMENT

I. The Sixth Circuit's Reversal Without Remanding on the Exception Issue Substantially Departs From Settled Judicial Procedure and Requires Review by This Court.

The Sixth Circuit's reversal without remanding the case for district court consideration of the applicability of the statutory exception substantially departs from settled judicial procedure. The district court did not reach or pass upon whether the exception applies to the transaction among the Governor, Decedent and the Trust. Indeed, it was unnecessary for the district court to address the exception until the Sixth Circuit held that Decedent must be deemed to have "transferred" stock to the Trust.

It is well settled that an appellate court ordinarily cannot base a reversal on a theory not relied upon in

the lower court. *See, e.g., Helvering v. Tex-Penn Oil Co.*, 300 U.S. 481, 498 (1937); *Stern v. United States Gypsum, Inc.*, 547 F.2d 1329, 1333-34 (7th Cir.), *cert. denied*, 434 U.S. 975 (1977). Instead, the appellate court should remand the case to the district court for consideration of any issue arising as a result of the appellate court's ruling. *See Guste v. Jackson*, 429 U.S. 399, 399-400 (1977) (per curiam); *Jimenez v. Weinberger*, 417 U.S. 628, 637-38 (1974); *United States v. Shelby Iron Co. of New Jersey*, 273 U.S. 571, 581-82 (1927); *Commissioner v. Estate of Nelson*, 396 F.2d 519, 524 (2d Cir. 1968).

The proper procedure is illustrated by the decision of the Second Circuit Court of Appeals in *Estate of Nelson*, 396 F.2d 519. The decedent in that case had established a trust to provide marital support for his wife pursuant to a divorce settlement. *Id.* at 521. The parties disagreed as to whether the value of the support rights relinquished by the wife was at least equal to the value of the property transferred to the trust by the decedent. The Tax Court fragmented the trust interests and concluded that the value of the support rights was full consideration for only a portion of those interests. *Id.* at 522-23. On appeal, the Second Circuit rejected this approach. *Id.* at 523-24. The court stated that if the value of the support rights were equal to or exceeded the value of the trust corpus as a whole, then full consideration was received. Rather than make that determination itself, however, the Second Circuit remanded the case for the lower court to ascertain the value of the support rights. *Id.*

As in *Estate of Nelson*, the Sixth Circuit here should have remanded the case to the district court for a determination of whether the value of the property Decedent received in the exchange with the Governor was equal to or exceeded the value of the property he is

deemed to have transferred. The impact of the Sixth Circuit's decision is to foreclose the parties' opportunity to be heard on the exception issue on remand.

Moreover, the citizens of Ohio have a substantial interest in uniform federal procedures and, in particular, in being treated in accordance with such rules once established. The Sixth Circuit's failure to follow established appellate procedures in this case, when citizens in other circuits have the benefit of such procedures, is antithetical to our federal system and calls for remedial action by this Court.

II. The Sixth Circuit's Decision Conflicts in Principle With This Court's Decision in *Estate of Grace* and With Other Circuits, Undermining the Uniform and Fair Administration of Federal Estate Taxation.

In *Estate of Grace*, this Court held that a transaction must be considered as a whole to determine its overall economic effect for purposes of federal estate taxation. 395 U.S. at 325; *see also Helvering v. Le Gierse*, 312 U.S. 531, 540 (1941). Several other circuit courts have correctly applied the principle in *Estate of Grace* to integrated transactions involving trusts to determine the applicability of the exception in Section 2036(a). These courts recognize that the exception may apply to such a transaction, depending on the overall effect of the entire transaction on the value of the decedent's estate. *See, e.g., Estate of Christ v. Commissioner*, 480 F.2d 171 (9th Cir. 1973); *In re Estate of Davis*, 440 F.2d 896 (3d Cir. 1971); *United States v. Gordon*, 406 F.2d 332 (5th Cir. 1969).

The Sixth Circuit's decision in this case, however, ignores the analysis required by *Estate of Grace* and followed by other circuits under Section 2036(a), thereby creating a conflict among the circuits in this area of

federal estate taxation.[5] As this Court has recognized on numerous occasions, it is important to resolve conflicts on issues of federal estate taxation. *See, e.g., United States v. Cartwright*, 411 U.S. 546, 550 (1973); *United States v. O'Malley*, 383 U.S. 627, 630 (1966); *Jackson v. United States*, 376 U.S. 503, 505 (1964); *Meyer v. United States*, 364 U.S. 410, 411 (1960).

The practical effect of the conflict will be that the estate tax treatment of taxpayers in the Sixth Circuit will differ from that accorded taxpayers in other circuits. Whenever a decedent has transferred property as part of an integrated transaction in Ohio, Michigan, Tennessee or Kentucky, the transferred property will be included in the decedent's estate under the Sixth Circuit's decision in this case, even when the value of the property received by the decedent as part of the exchange equals or exceeds the value of the property transferred. Such transferred property would not be included in a decedent's estate if the decedent were a resident of any other state. Moreover, only estates in the Sixth Circuit will be subject to double taxation—the transferred property will be taxed under Section 2036(a), and the property received will be taxed as part of the estates' assets. It is important for the fair, efficient and uniform administration of federal tax laws that this inequity be addressed by the Supreme Court. *See Ivan Allen Co. v. United States*, 422 U.S. 617, 623-24 (1975); *United States v. Donruss Co.*, 393 U.S. 297, 299 (1969); *Commissioner v. Bilder*, 369 U.S. 499, 501 (1962).[6]

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[5] Although the Sixth Circuit relied on *Estate of Grace* in ruling that extrinsic and subjective evidence cannot be utilized to reconstruct the terms of a trust, 831 F.2d at 641-42, the court ignored the principle also set forth in that case that interrelated parts of a transaction must be considered together. *See* 395 U.S. at 325; *see also Le Gierse*, 312 U.S. at 540.

[6] Similarly, important technical issues affecting the efficient and uniform administration and enforcement of federal tax laws have been addressed and resolved by the Supreme Court. *See, e.g., Donaldson v. United States*, 400 U.S. 517, 522 (1971) (interest of

Further, this Court has indicated that the potentially recurring nature of a conflict in the administration of tax laws is a significant reason for resolution of the issue in the Supreme Court. *Bruning v. United States*, 376 U.S. 358, 359-60 (1964) (certiorari granted partly because of potentially recurring nature of question as to recoverability of post-bankruptcy interest on tax assessment); *see also United States v. Gilmore*, 372 U.S. 39, 40-41 (1963) ("continuing importance" of question regarding deductibility of legal expense in divorce action). The conflict created by the Sixth Circuit in this case will continue under the Tax Reform Act of 1986, which retains Section 2036(a) and its exception for transactions for "an adequate and full consideration." *See* 26 U.S.C. § 2036(a). Thus, it is essential that this issue be resolved in the Supreme Court.

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taxpayer in proceedings to enforce internal revenue summons); *United States v. Union Central Life Ins. Co.*, 368 U.S. 291, 293 (1961) (income tax filing requirements); *United States v. Brosnan*, 363 U.S. 237, 240 (1960) (whether state proceedings extinguished federal tax lien); *Colony, Inc. v. Commissioner*, 357 U.S. 28, 31-32 (1958) (proper scope of statute of limitations for income tax reporting).

CONCLUSION

For the reasons set forth above, the State of Ohio and the Foundation respectfully request that the Estate's Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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April 15, 1988

No. 87-1521

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

DANIEL J. MAHONEY, JR.,
EXECUTOR OF THE ESTATE OF JAMES M. COX, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

In this case, the Sixth Circuit: (1) reached out and decided an issue not decided by the district court, thereby departing from accepted judicial procedure; and (2) decided the issue in such a way as to amount to a holding that the bona fide sale exception in Section 2036(a) can never apply to an integrated transaction involving a gift, thereby conflicting in principle with the decisions of other circuits. This case raises substantial issues of judicial procedure and estate tax administration that should be addressed in this Court.[1]

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[1] To the extent the Government believes the "widow's election" cases are incorrectly decided and should be revisited, Opposition at

The Government argues that this Court should not decide the merits of an issue not presented to the Sixth Circuit, but fails to recognize that, under its own reasoning, it was error for the Sixth Circuit to decide an issue not presented to it and not decided by the district court.[2] As the Government admits, Opposition at 4, the only issue on appeal was whether Decedent had "made a transfer." Had the Sixth Circuit resolved only that issue, this petition would be unnecessary, but the Sixth Circuit went further and held that the value of the stock "must be included" in Decedent's gross estate. That holding on the broader issue of includibility arguably forecloses consideration of the statutory exception even though the district court did not decide the issue.

The Government incorrectly glosses over this procedural error by arguing that the Estate should have raised the statutory exception issue on appeal. This is wrong; indeed, it would have been improper for the Estate to have raised in the Sixth Circuit the applicability of the statutory exception. There was no factual finding by the district court as to whether Decedent received as much in

10 & n.4, that is another reason this Court should grant the petition for a writ of certiorari. In any event, the Estate cited numerous cases that did not involve "widow's elections." *See, e.g., In re Estate of Davis,* 440 F.2d 896 (3d Cir. 1971); *United States v. Past,* 347 F.2d 7 (9th Cir. 1965); *Sullivan's Estate v. Commissioner,* 175 F.2d 657 (9th Cir. 1949); *Helvering v. United States Trust Co.,* 111 F.2d 576 (2d Cir.), *cert. denied,* 311 U.S. 678 (1940).

[2] The Government is clearly wrong in asserting that the Estate failed to explain to this Court the broad procedural issue presented in this case "that warrants the attention of this Court." Opposition at 7. The Estate plainly states that the Sixth Circuit, in reversing without remanding, "[decided] an issue not passed upon below," and the Estate specifically requests that this Court exercise its supervisory authority over an inferior federal court that has ". . . substantially depart[ed] from the accepted and usual course of judicial proceedings and the disposition of federal litigation." Petition at 12-13 (citations omitted).

the exchange with the Trust as he transferred, because the district court ruled that there was no "transfer" under Section 2036(a) in the first instance. District court consideration of the applicability of the statutory exception is necessary only as a result of the Sixth Circuit's decision that Decedent must be deemed to have made a "transfer" under Section 2036(a).[3]

The Government also errs in arguing that the statutory exception cannot apply to Decedent's "transfer" to the Trust. It contends that, although Decedent received property from the Trust as part of the transaction, the transfer *to* Decedent somehow was separate from the rest of the transaction and, in any event, was a gift, which the Government argues cannot constitute consideration in this case. This is wrong for two reasons.

First, it is inconsistent and improper to treat different parts of the integrated transaction as though each occurred in isolation. *See United States v. Estate of Grace*, 395 U.S. 316, 325 (1969); *Helvering v. Le Gierse*, 312 U.S. 531, 540 (1941). The Sixth Circuit considered the total economic effect of the integrated transaction to determine that Decedent must be considered to have made a "transfer" of 85 shares. It is not disputed that, as part of the overall transaction, Governor Cox required Decedent to make this "transfer" to the Trust. Therefore, the Sixth Circuit should have remanded the case for the district court to consider the total economic effect of the integrated transaction in light of the Sixth Circuit's ruling, to determine whether the transfer was an exchange for at least equivalent value (a life interest in 665 shares) under the statutory exception.

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[3] Contrary to the Government's implication, the Estate did follow proper procedure in light of the Sixth Circuit's decision. The proper procedure when a mandate might foreclose consideration of an unresolved issue is to move for modification of the mandate. *Riley v. MEBA Pension Trust*, 586 F.2d 968, 972 (2d Cir. 1978).

Second, the characterization of Governor Cox's transfer of 665 shares to the Trust as a gift is not dispositive of whether Decedent received in exchange for his 85 shares consideration of at least equivalent value. The Government broadly asserts, without citation of authority, as follows:

> A donative transfer is, by definition, the opposite of a bargained-for exchange; plainly, a gift cannot be part of "a bona fide sale for an adequate and full consideration" within the meaning of Section 2036(a).

Opposition at 10. This is incorrect. A "gift" under the gift tax laws does not necessarily entail donative intent, *Commissioner v. Wemyss*, 324 U.S. 303, 306 (1945), and the property may constitute "consideration" as part of an integrated transaction. *See Commissioner v. Bristol*, 121 F.2d 129, 133-34 (1st Cir. 1941).[4] A mutual promise

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[4] The Government misplaces reliance on *Giannini v. Commissioner*, 148 F.2d 285 (9th Cir.), *cert. denied*, 326 U.S. 730 (1945). In *Giannini*, the decedent's transaction with the trust involved an explicit statement attached to the trust agreement whereby the decedent expressly accepted his parents' gift to the trust. 148 F.2d at 286. In contrast, Decedent here paid consideration, executing a promissory note "in payment for 750 shares of stock." Petition Appendix at 12a. Now that the Sixth Circuit has determined that Decedent in substance paid consideration for 85 shares, which he was required to transfer to the Trust, the district court must determine whether Decedent received in exchange at least equivalent value as part of the integrated transaction.

The other cases cited by the Government also do not support its position. In each case, the decedent clearly had received less than adequate and full consideration for the property transferred. *See Mollenberg's Estate v. Commissioner*, 173 F.2d 698, 701 (2d Cir. 1949); *Phillips v. Gnichtel*, 27 F.2d 662, 664 (3d Cir. 1928); *Estate of Schwartz v. Commissioner*, 9 T.C. 229, 237-38 (1947). Indeed, these cases support the Estate's position that separate parts of an integrated transaction must not be viewed in isolation and that the characterization of one part of such a transaction as a gift is not dispositive of whether the decedent received at least equivalent value in the exchange. *See Mollenberg's Estate*, 173 F.2d at 701; *Estate of Schwartz*, 9 T.C. at 239.

may be consideration to support an agreement, even though a portion of one party's transfer is a gift under federal gift or estate tax laws. *See id.*[5] For purposes of the Internal Revenue Code, consideration is received if a party transfers property and it is replaced with property of at least equivalent value in money or money's worth. *See id.*[6]

For the reasons stated above, in the Petition, and in the Joint Brief of Amici Curiae, this Court should grant the Estate's Petition for a Writ of Certiorari.

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June 2, 1988

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[5] The fact that the excess of what Decedent received (a life interest in 665 shares) over what he transferred (85 shares) may be a gift, *see Bristol*, at 133-34, is irrelevant to whether he actually received at least equivalent value in the exchange.

[6] As the Government recognizes, the purpose of this provision is to prevent depletion of an estate without payment of estate tax. Opposition at 9. Nonetheless, the Government wholly failed to address whether Decedent's estate actually was depleted as a result of the integrated transaction. This issue is one appropriately to be decided by the district court.